government insurgents in Colombia. The government of Colombia is unable to control the political insurgency, which has, in the words of the government's chief witness at trial, "melded" with the major narcotrafficking organizations which were the subject of the DEA money-laundering operation (App. 46-47, A39-40);

(3) The DEA obtained a visa for Mr. Perafan and his wife to come to the United States because the DEA feared that the narcotraffickers would retaliate against Mr. Perafan on account of their mistaken belief that he knowingly worked with the DEA's money laundering operation and provided intelligence to the United States government about narcotraffickers/ insurgents (App. 28-29);

(4) Once Mr. Perafan arrived in the United States, the DEA fell out with Cruz, lost interest in Mr. Perafan, and provided no assistance to him in obtaining permanent immigration status in the United States (App. 29-30);

(5) Mr. Perafan presented sufficient evidence to persuade the Immigration Judge that he had a well-founded fear of persecution if he returned to Colombia because Cruz was killed when he returned to Colombia (App. 48-49), Mr. Perafan's brother was killed on account of Mr. Perafan's relationship with the DEA, and

> Mr. Perafan's mother (App. A28) and sister-in-law (App. A27) were threatened by narcotraffickers on account of Mr. Perafan's involvement with the DEA, requiring them to relocate their homes;
>
> (6) The Immigration Judge found that Mr. Perafan's "association with the DEA was tantamount to choosing the other side in their conflict with the Colombian government. If, therefore, that conflict is political, the opinions imputed to Respondent would trigger the protection of United States asylum law (App. A46)." The judge found, based on the evidence presented by the government at trial, that the drug war between the United States and Colombian governments and the narcotrafficker-insurgents, is political (App. A47-49).

The INS appealed the Immigration Judge's ruling, and the Board of Immigration Appeals (BIA) found that Mr. Perafan did not present sufficient evidence that he feared persecution if he returned to Colombia (A14).

On appeal, the Fourth Circuit ruled that Mr. Perafan was not entitled to asylum because "a political opinion applicant must show" that his acts "were grounded in principle, inspired by altruism, or intended to advance a cause," and Mr. Perafan did not meet that standard (A10).

Mr. Perafan filed a petition for rehearing en banc, which was denied on June 1, 2005 (A1).

## REASONS WHY THE WRIT SHOULD BE GRANTED

### I. THERE IS A SPLIT AMONG THE CIRCUITS AS TO WHAT CONSTITUTES "POLITICAL" OPINION.

The Fourth Circuit's decision illustrates a split among the Circuits as to what constitutes "political" activity or political opinion.

In *INS v. Elias-Zacarias*,[3] this Court held that a Guatamalan who fled to this country to avoid being forced to join anti-government guerillas did not establish that he was being persecuted on account of political opinion because the motives of the victim and the motives of the persecutors were not necessarily political. The Court held that the victim, in resisting military service, was not necessarily expressing a political opinion because even:

> a person who supports a guerilla movement might resist recruitment for a variety of reasons--fear of combat, a desire to remain with one's family and friends, a desire to earn a better living in civilian life, to

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[3] 502 U.S. 478 (1992); *see, e.g., Sangha v. INS*, 103 F.3d 1482, 1489 (9th Cir. 1997); *see also Steel on Immigration Law* § 8.07(a)(2000) (citing memorandum opinion by General Counsel of INS that imputed political opinion can constitute basis for asylum claims under *Elias-Zacarias*).

mention only a few.[4]

The Court also found that the guerillas, in forcing a person into joining them, were not necessarily persecuting their conscript on account of his political opinion because the guerillas, merely wishing to fill their ranks, may not care what political opinion the conscript holds.[5] Thus, the Court's opinion seems to say that the focus of a political asylum case must be on the political opinion held by the victim.

The Court held that Elias-Zacarias did not meet his burden of proof because he produced no evidence that the guerillas have a political "motive" in forcing him to join them:[6] there was no evidence that the guerillas were forcing him to join them because of his political opinion.

The dissent, written by Justice Stevens, stated that the majority's "narrow, grudging construction of the concept of 'political opinion'"[7] did not take into account the reality that political persecution occurs when a victim is persecuted takes sides in a conflict: when the either takes part in activity on behalf of the government or its enemies or refuses to do so.

Since *Elias-Zacarias*, the Third, Eighth, and Ninth Circuits have applied the phrase "political" so as to cover

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[4] 502 U.S. 482.

[5] *Id.*

[6] 502 U.S. at 483.

[7] *Id.* at 487.

the Perafan's situation.

In *De Brenner v. Ashcroft*,[8] the Eighth Circuit considered the case of a wealthy Peruvian who fled persecution from the Shining Path guerillas, who sought to "take from the rich and give to the poor."[9] The Immigration Judge granted asylum, but the BIA reversed, finding that the Shining Path persecuted the victim because of her wealth, not because of a political opinion. The Eighth Circuit reversed, finding that the Shining Path imputed a political opinion in favor of the current capitalist system, and she was entitled to political asylum based on an "imputed political opinion."[10]

In *Lukwago v. Ashcroft*,[11] the Third Circuit reversed the BIA's denial of asylum to a Ugandan who, as a child, was kidnapped by rebels and forced to fight with them against government soldiers. The BIA had held that Lukwago's case was governed by *Elias-Zacarias*. The Third Circuit found that "[t]here is nothing in the Supreme Court opinion to suggest that forced conscription by a guerilla organization cannot constitute persecution," merely that it cannot constitute persecution on the grounds of political opinion. The Third Circuit then held that Lukwago was a member of a different protected class-a social group consisting of youths whom

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[8] 388 F.3d 629 (8th Cir. 2004)

[9] *Id.* at 631.

[10] *Id.* at 637.

[11] 329 F.3d 157 (3d Cir. 2003)

the guerillas abducted and forced into military service.[12] The Third Circuit has merely circumvented this Court's opinion in *Elias-Zacarias*by defining the very group which this Court held did not consitute a protected group on account of political opinion as a protected group on account of their membership in "a particular social group."

In *Agbuya v. INS*,[13] the Ninth Circuit held that a Filipino was persecuted on account of imputed "political" opinion when she was kidnapped and abused by communist insurgents because she had taken actions, during the course of her employment with a mining company, which they considered to be contrary to the benefit of laborers, even though there was no evidence that she held a political opinion adverse to the communists. The majority disregarded the dissent's argument, based on *Elias-Zacarias*,that the case did not involve political opinion but merely a labor dispute. The majority wrote:

> There is little doubt that Agbuya was singled out by the guerillas for persecution because of the unpopular actions she took while an employee of Benguet. In the context of the communist guerilla insurgency in the Phillipines, however, Agbuya's personnel actions took on an importance beyond the impact on the miners. A reasonable factfinder would have to conclude that the communist NPA

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[12] *Id.* at 171-3.

[13] 241 F.3d 1224 (9th Cir. 2001).

> interpreted Agbuya's actions as an affront to their cause: Agbuya as viewed as politically aligned with the mining company and the government, and against the NPA.[14]

Other circuits have held that acting as an informant for one side in a sustained conflict constitutes an expression of political opinion. For example, in *Briones v. INS*,[15] the Ninth Circuit found that "Briones's activity as a confidential informer who sided with the Philipine military in a conflict that was political at its core certainly would be perceived as a political act by the group informed upon . . ." In *Fadul v. INS*,[16], the Seventh Circuit stated, in dicta, that testimony that petitioner was viewed as a government informant may support a claim based on political opinion.

The Fourth Circuit has defined "political" narrowly. The court held that when an applicant "has not taken sides" in an "organized insurgency" and "the conflict, though ubiquitous, is not aimed at controlling the organs of state, an applicant cannot merely describe his involvement with one side or the other to establish a political opinion." (App. A11).

The political aspect of this case is unusual in that the political struggle in which Mr. Perafan became involved is two-dimensional: a struggle between the

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[14] 241 F.3d at 1229-30.

[15] 175 F.3d 727 (9th Cir. 1999)

[16] 210 F.3d 374 (7th Cir. 2000).

narcotraffickers-insurgents against the government of Colombia and the narcotrafficker-insurgents struggle against the United States, a struggle that is waged by the United States government in Colombia. But there is no question that narcotraffickers, whose cause, according to the evidence at trial (App. A46-47;A39-40),has "melded" with the anti-government insurgency which seeks to seize the reins of government in Colombia, seek to harm Mr. Perafan because they believe that he took sides against them and with the United States government.

The Fourth Circuit's conclusion that Mr. Perafan's fear of persecution is not "on account of" a "political opinion" ignores the reality that Perafan's boss, Cruz, was killed, Mr. Perafan's own brother was killed, and Mr. Perafan's sister-in-law and mother were forced to move as a result of death threats, all in retaliation for Mr. Perafan's imputed cooperation with our government in that struggle. There is no other basis for that persecution--there was no evidence in the record to support the conclusion that the narcotraffickers had any other motive against the Perafan family other than retaliation on account of their belief that Mr. Perafan cooperated with the United States in its war against them.

Mr. Perafan's cooperation with the United States government in the war which, the government's own witness testified, we are (or were at the time) prosecuting in Colombia was an inherently political act. It was an act performed in support of the policy of the American and Colombian government and against the anti-government insurgents/narcotraffickers in Colombia. Mr. Perafan's fear that he will face retaliation from the insurgents/narcotraffickers "on account of" his imputed

cooperation with the United States is persecution "on account of" the political opinion imputed to him that he supported the American and Colombian governments and did not support the insurgents/narcotraffickers. The Fourth Circuit's decision implies that if Mr. Perafan had carried a sign which said "down with narcotraffickers" and feared retaliation he would be eligible for asylum because the retaliation would be "on account of" a political expression, but since he took the more profound and active step of actually assisting the United States government in its war on drugs, his fear of retaliation is not "on account of" political opinion. This reasoning does not make sense.

The proper legal standard for political asylum is whether the applicant has a well-founded fear of persecution "on account of political opinion." Mr. Perafan is afraid of persecution because the narcotraffickers believe that he cooperated with the DEA, against them. They perceive that Mr. Perafan expressed a political opinion by working with the United States government against the narcotraffickers, who, according to the government's own testimony, are identical to the political insurgents. The evidence in the record clearly establishes that Mr. Perafan has a well-founded fear of retaliation by the narcotraffickers.

The Fourth Circuit's policy argument that allowing Mr. Perafan's claim would cause the proliferation of asylum grants is mere hyperbole. A review of the case law indicates that there are no other cases where the United States government obtained a visa for an individual who cooperated with an American law enforcement investigation in a foreign country--on the grounds that the person was in danger in the foreign

country--and then abandoned the person in the United States without immigration status, even though the person showed a well-founded fear of harm in the foreign country and, indeed, the danger to the person was the basis for our government bringing him here in the first place. Mr. Perafan's situation is unique--it would not "cause the proliferation of asylum grants." Even if the recognition of imputed political opinion as a basis for asylum would result in an increased number of asylum grants, this was a result which Congress anticipated when it enacted the Refugee Act of 1980. As this Court wrote in *INS v. Cardoza-Fonseca*:

> The [House] Committee carefully considered arguments that the new definition might expand the numbers of refugees eligible to come to the United States and force substantially greater refugee admissions than the country could absorb. . . . Congress has assigned the Attorney General and his delegates the task of making these hard individualized decisions; although Congress could have crafted a narrower definition, it chose to authorize the Attorney General to determine which, if any, eligible refugees should be denied asylum.[17]

If the actual facts of Mr. Perafan's case are analyzed, and not distorted into a case which was not presented at trial, it is self-evident that Mr. Perafan's fear of danger based on his cooperation with our government is precisely the type of case which our asylum law ought

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[17] 480 U.S. 421, 444-445 (1987).

to cover: such an application of asylum law promotes the integrity of our government, so that we are not perceived to abandon foreigners who assist us in pursuing our policies overseas, and is consistent with the traditional human rights basis of political asylum.

The Fourth Circuit, by focusing on Mr. Perafan's motives--confuses the motives which ought to be examined in an asylum case. The panel mixes up the proper focus of an asylum case, looking at the case backwards; the panel does not focus on the motives of the persecutors, who are the only people who can engage in persecution "on account of" any reason, but instead examines the motives of the applicant, which are not relevant. The logic of this is obvious, even in an asylum setting which is noncontroversial: if the Chinese government believed that an individual was an anti-Communist dissident and intended to persecute the person upon his return to China, he would be entitled to asylum, even if the individual was not really a dissident but the government mistakenly believed him to be one. Thus, the proper focus is on the motives of the persecutors, not the asylum seeker, and whether the persecutors impute, rightly or wrongly, a political opinion to the asylum seeker.

If Mr. Perafan lived in the Third, Eighth, or Ninth Circuit, the Court of Appeals would have held that the facts of his case constitute persecution on account of political opinion. Since Mr. Perafan lives in the Fourth Circuit, which has construed *Elias-Zacarias* narrowly, he has been denied asylum and faces deportation to near-certain death in Colombia.

## II. THERE IS A SPLIT AMONG THE CIRCUITS AS TO WHETHER AN IMPUTED POLITICAL OPINION MAY FORM THE BASIS OF POLITICAL ASYLUM IN THE UNITED STATES.

There is a split among the Circuit Courts of Appeals as to whether an imputed political opinion may form the basis of political asylum.

In *Elias-Zacarias*,this Court did not address whether an asylum seeker must actually hold the political opinion for which he is being persecuted, or whether the mere belief by the persecutors that the victim held an adverse political opinion would be sufficient. The Court left this question of imputed political opinion open. The Court wrote:

> Nor is there any indication (assuming, *arguendo*, it would suffice) that the guerillas erroneously believed that Elias-Zacarias' refusal was politically based."[18]

In the thirteen years since *Elias-Zacarias*was decided, seven Circuits and the Board of Immigration Appeals (BIA) have held that persecution on account of imputed political opinion may be the grounds for political asylum, even if the persecutors erroneously attribute the political belief to the victim.[19]

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[18] 502 U.S. at 482.

[19] *Ravindran v. INS*, 976 F.2d 754 (1st Cir. 1992); *Singh v. Gonzalez*, 406 F.3d 191 (3d Cir. 2005); *Lwin v. INS*, 144 F.3d 505, 509 (7th Cir. 1998); *De Brenner v.*

However, the Fourth Circuit, in this case, has ruled that "a political opinion applicant must show" that his acts "were grounded in principle, inspired by altruism, or intended to advance a cause" (App. A10). The Fourth Circuit decision required Mr. Perafan to show that he actually held a political opinion adverse to the narcotraffickers/insurgents, not merely that the narcotraffickers imputed a political opinion to him. Thus, the Fourth Circuit has staked out a position different from the other Circuits: on the question of whether an erroneous belief by persecutors that a victim held a political opinion "would suffice," to support an asylum application, such a belief does not suffice in the Fourth Circuit. Instead, an asylum applicant must show that he actually holds a political opinion "grounded in principle," "inspired by altruism," or "intended to advance a cause."

Although the Fourth Circuit has not explicitly stated that an imputed political opinion may not form the basis for an asylum claim, its holding in this case that the applicant must actually hold a politial opinion forecloses an asylum applicant in the Fourth Circuit from claiming that a political opinion is imputed to him by his persecutors.

Therefore, the Fourth Circuit's decision is at variance with the Circuits that have recognized imputed political opinion as a grounds for political asylum, and

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*Ashcroft*, 388 F.3d 629 (8th Cir. 2004); *Sangha v. INS*, 103 F.3d 1482, 1489 (9th Cir. 1997); *Elzour v. Ashcroft*, 378 F.3d 1143 (10th Cir. 2004); *Al Najjar v. Ashcroft*, 257 F.3d 1262, 1284 (11th Cir. 2001); *Matter of S-P-*, 21 I & N Dec. 486, BIA LEXIS 25 (BIA 1996).

begs the question left open by *Elias-Zacarias*:whether imputed politcal opinion, even an erroneous imputation, may form the basis for political asylum.

## III. THE FOURTH CIRCUIT APPLIED THE BURDEN OF PROOF IN A MANNER WHICH IS NOT CONSISTENT WITH THE OTHER CIRCUITS.

The asylum statute provides no guidance as to the burden of proof which an asylum must meet in an asylum case. The Attorney General's regulation for establishing eligibility for asylum states that, "[t]he burden of proof is on the applicant for asylum to establish that he or she is a refugee."[20] The regulation also provides that "[t]he testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration."[21] The phrase "burden of proof" in 8 C.F.R. § 208.13(a)(2004) is ambiguous: it is not clear whether the asylum seeker must meet a burden of production (merely establish a *prima facie* case that he is a refugee), a burden of going forward (which may shift back and forth between the parties as the trial progresses), or a burden of persuasion and, if a burden of persuasion must be carried, whether that burden must be met to the preponderance of the evidence standard.[22]

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[20] 8 C.F.R. § 208.13(a)(2004).

[21] *Id.*

[22] These burdens of proof are described in *Ambrose v. Wheatley*, 321 F. Supp. 1220, 1222 (D. Del. 1971); *see also Director v. Greenwich Collieries*, 12 U.S. 267, 272 (1994).

This problem was identified by Justice Stevens in his dissent to *Elias-Zacarias*,when he wrote:

> The narrow, grudging construction of the concept of "political opinion" that the court adopts today is inconsistent with the basic approach to the statute taken in *INS v. Cardozo-Fonseca*. . In that case, relying heavily on the fact that an alien's status as a "refugee" merely makes him eligible for a discretionary grant of asylum--as contrasted with the entitlement to a withholding of deportation authorized by § 243(h) of the Act--the Court held that the alien's burden of proving a well-founded fear of persecution did not require proof that persecution was more likely than not to occur. We explained:
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> "Our analysis of the plain language of the Act, its symmetry with the United Nations Protocol, and its legislative history, lead inexorably to the conclusion that to show a 'well-founded fear of persecution,' an alien need not prove that it is more likely than not that he or she will be persecuted in his or her home country. We find these ordinary canons of statutory construction compelling, even without regard to the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien."[23]

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[23] 502 U.S. at 487.

## A. BURDEN OF PROOF IN ASYLUM CASES BEFORE 1987.

In *INS v. Cardozo-Fonseca*,[24] this Court was asked to determine whether an alien seeking asylum under INA § 208(a) was required to meet he same "burden of proof" as an alien seeking withholding of deportation under INA § 243(h). In holding that an asylum seeker had a lesser burden of proof, this Court held "'the persecution or well-founded fear of persecution' standard governs the Attorney General's determination whether an alien is eligible for asylum."[25] In reaching the conclusion that the standards for withholding of deporation and asylum were different, the Court reasoned:

> In contrast, the reference to "fear" in the § 208(a) standard obviously makes the eligibility determination turn to some extent on the subjective mental state of the alien. "The liguistic difference between the words 'well founded fear' and 'clear probability' may be as striking as that between a subjective and an objective frame of reference . . . . We simply cannot conclude that the standards are identical."
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> . . .

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[24] 480 U.S. 421, 430-31 (1987) ("[O]ne can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place.")

[25] *Id.* at 428.

> The BIA agrees that the term "fear," as used in this staute, referes to "a subjective condition, an emotion characterized by the anticipation or awareness of danger." That the fear must be "well-founded" does not alter the obvious focus on the individual's subjective beliefs, nor does it tranform the standard into a "more likely that not" one. One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place. As one leading authority has pointed out:
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> "Let us . . . presume that it is known that in the applicant's country of origin every tenth adult male person is put to death or sent to some remote labor camp . . . . In such a case it would be only too apparent that anyone who has managed to escape the country in question will have 'well-founded fear of being persecuted' upon his eventual return."[26]

## B. HOW THE BURDEN OF PROOF IS UNCERTAIN.

The ambiguity created by this Court's holding that "the persecution or well-founded fear of persecution standard governs" an asylum seeker's eligibility for relief is that the Court did not clarify whether this was a "burden of production," a "burden of going forward," a "burden of persuasion," or a "burden of proof," and, if a

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[26] *Id.* at 430-1.

burden of proof, what level of proof would satisfy the burden. As a result of this ambiguity, the Circuit Courts have reached different conclusions as to what amount of proof is required in asylum cases.

1. BURDEN OF PROOF.

The burden of proof has often been used to describe two concepts:

> (1) the burden of persuasion, which under the traditional view never shifts from one party to the other, at any stage of the proceedings, and (2) the burden of going forward with the evidence, which may shift back and forth between the parties as the trial progresses.[27]

However, due to much confusion over the use of the term, this Court has expressed a preference to limit the meaning of "burden of proof" to only the "burden of persuasion."[28] Thus, for example, in construing the phrase "burden of proof" in § 7(c) of the Administrative

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[27] *Ambrose v. Wheatley*, 321 F. Supp. 1220, 1222 (D. Del. 1971); *see also, Director v. Greenwich Collieries* 512 U.S. 267, 272 (1994).

[28] *Id.* at 274-75; *see also Webre Steib Co. v. Commisioner*, 324 U.S. 154, 171 (1945); *Commercial MolassesCorp. v. N.Y. Tank Barge Corp.*, 314 U.S. 104, 111 (1941); *Radio Corp. of America v. Radio Engineering Laboratories, Inc.*, 293 U.S. 1, 7-8 (1934); *Brosnan v. Brosnan*, 263 U.S. 345, 349 (1923); *Hill v. Smith*, 260 U.S. 592, 594 (1923).

Procedures Act ("APA"), this Court wrote: "[w]e interpret Congress' use of the term 'burden of proof' in light of this history, and presume Congress intended the phrase to have the meaning generally accepted in the legal community at the time of enactment."[29]

2. BURDEN OF PERSUASION.

The party with the burden of persuasion must convince the fact-finder to view the facts in a way that favors that party. In civil cases, the moving party must usually prove his case "by a preponderance of the evidence," while criminal cases are subjected to the higher standard of "beyond a reasonable doubt."[30] The party bearing the burden of persuasion retains that burden throughout the duration of the case, regardless of whether the burden of going forward shifts.[31]

3. BURDEN OF GOING FORWARD.

The burden of going forward has been described as the same as the burden of production.[32] However, the burden of going forward may shift during the course of a

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[29] *Director v. Greenwich Collieries*, 512 U.S. a 275.

[30] BLACK'S LAW DICTIONARY (8th ed. 2004).

[31] *Commercial MolassasCorp. v. NY Tank Barge Corp.*, 314 at 110-11.

[32] *Director v. Greenwich Collieries*, 512 U.S. at 272.

trial.[33]

## 4. BURDEN OF PRODUCTION.

The determination of whether a party has satisfied the burden of production is purely a legal issue, which does not involve an assessment of the credibility of the evidence tendered.[34] The trial judge is merely required to assess whether the evidence introduced, if "*taken as true*, would *permit* the conclusion,' sought by the party offering the evidence."[35] The burden of production remains static throughout the duration of the case, and it referes to meeting a threshhold of elemental proof before an issue can be submitted to the fact-finder.

As this Court held in *Cardozo-Fonseca*,[36] it makes sense that a burden of production should be applied in asylum cases because the applicant is only required to make a *prima facie* showing that he is eligible for asylum and the Attorney General retains discretion as to whether to grant asylum. The applicant should be able to get to the stage of the proceeding where the Attorney General may exercise his discretion by merely carrying a burden

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[33] *Barnes v. U.S.*, 12 U.S. 837, 846 n. 11 (1973); *Konigsberg v. California*, 366 U.S. 36, 40 n.4 (1960).

[34] *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509 (1993).

[35] *Id. (emphasis in original).*

[36] 480 U.S. at 428.

of production.[37]

### C. IT IS UNCLEAR WHETHER AN ASYLUM APPLICANT MUST MEET A BURDEN OF PRODUCTION OR A BURDEN OF PERSUASION.

Since *Cardoza-Fonseca*, the Courts of Appeals and the BIA have disagreed on the burden of proof to be applied in asylum cases. The First,[38] Second,[39] Third,[40] Eighth,[41] Eleventh Circuits,[42] and the BIA[43] have held that an alien must meet a preponderance of the evidence standard, even though this Court held otherwise in

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[37] 8 C.F.R. § 208.14(a)(2004).

[38] *See, e.g., Diab v. Ashcroft*, 397 F.3d 35 (1st Cir. 2005); *Settenda v. Ashcroft*, 377 F.3d 89 (1st Cir. 2004).

[39] *See, e.g., Zhang v. INS*, 386 F.3d 66 (2d Cir. 2004); *Ramsameachire v. Ashcroft*, 357 F.3d 169 (2d Cir. 2004); *We Biao Chen v. INS*, 344 F.3d 272 (2d Cir. 2003).

[40] *See, e.g., Chen v. Ashcroft*, 376 F.3d 215 (3d Cir. 2004).

[41] *See, e.g., Kondakova v. Ashcroft*, 383 F.3d 792 (8th Cir. 2004).

[42] *See, e.g., D-Muhumed v. U.S. Attorney General*, 388 F.3d 814 (11th Cir. 2004).

[43] *In re M.D.*, 21 I&N Dec. 1180 (BIA 1998) (BIA held that alien bears the burden of proof to establish eligibility for asylum).

*Cardozo-Fonseca*. Decisions from the First,[44] Second,[45] Third,[46] Seventh,[47] Eighth,[48] Ninth,[49] Tenth Circuits,[50] and the BIA,[51] have held that an alien must merely meet a burden of producing some evidence of persecution on

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[44] *See, e.g. Mukamusoni v. Ashcroft*, 390 F.3d 119 (1st Cir. 2004); *Hernandez-Barrera v. Ashcroft*, 373 F.3d 9 (1st Cir. 2004).

[45] *See, e.g. Jin Shui Qiu v. Ashcroft*, 329 F.3d 140 (2d Cir. 2003); *Osorio v. INS*, 18 F.3d 1017 (2d Cir. 1994); *Michael v. Slattery*, 852 F. Supp. 211 (S.D.N.Y. 1994).

[46] *See, e.g. Leia v. Ashcroft*, 393 F.3d 427 (3d Cir. 2004); *Berishaj v. Ashcroft*, 378 F.3d 314 (3d Cir. 2004).

[47] *See, e.g. Lin v. Ashcroft*, 385 F.3d 748 (7th Cir. 2004); *Gontcharova v. Ashcroft*, 384 F.3d 873 (7th Cir. 2004); *Ememe v. Ashcroft*, 358 F.3d 446 (7th Cir. 2004).

[48] *See, e.g. Ahmadshah v. Ashcroft*, 396 F.3d 917 (8th Cir. 2005); *El-Sheikh v. Ashcroft*, 388 F.3d 643 (8th Cir. 2004); *Awale v. Ashcroft*, 384 F.3d 792 (8th Cir. 2004).

[49] *See, e.g., Yeimane-Berhe v. Ashcroft*, 393 F.3d 907 (9th Cir. 20040; *Kaiser v. Ashcroft*, 390 F.3d 653 (9th Cir. 2004); *Shire v. Ashcroft*, 388 F.3d 1288 (9th Cir. 2004).

[50] *See, e.g., Wiramsame v. Ashcroft*, 366 F.3d 889 (10th Cir. 2004).

[51] *See, e.g. In re A.E.M.*, 21 I&N Dec. 1157 (BIA 1998)(BIA reversed Immigration Judge's finding that burden of production was not satisfied); *In re O.D.*, 21 I&N Dec. 1079 (BIA 1998)(BIA reversed an Immigration Judge's decision to deny asylum based on credibility).

account of an enumerated ground, so as to establish eligibility for asylum, and the Attorney General may then exercise discretion as to whether to grant asylum.

Here, the Immigration Judge improperly required Mr. Perafan to meet a burden of persuasion (App. A30). However, the judge found that Mr. Perafan met the burden of persuasion, feared persecution on the basis of an imputed political opinion, and was eligible for asylum (App. A46-49). The BIA applied a "more likely than not" standard of proof and found that Perafan did not prove this claim under that standard (App. A18); the BIA did not rule that his claim was not grounded in a political opinion (App. A19), but that the quantum of evidence was insufficient. Therefore, the BIA's application of the more likely than not standard of proof was "manifestly contrary to the law and an abuse of discretion,"[52]

The Fourth Circuit's decision in this case, affirming the BIA's application of the "more likely than not" standard, has placed itself in opposition to the Supreme Court's ruling in *Cardozo-Fonseca* and with the Courts that have allowed a burden of production to be applied in asylum cases. The Fourth Circuit's decision that "a political opinion applicant must show" that it is more likely than not that his acts "were grounded in principle, inspired by altruism, or intended to advance a cause" expands the drift away from the Supreme Court's ruling in *Cardozo-Fonseca* and imposed a burden on Mr. Perafan that is not required by the statute, the applicable regulations, or by the applicable Supreme Court precedent of *Cardozo-Fonseca*.

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[52] 8 U.S.C. § 1252(b)(4)(D).

If Mr. Perafan lived in one of the Circuits which followed this Court's rule in *Cardozo-Fonseca*, and where he would have only been required to produce credible evidence that the narcotraffickers/insurgents wished to kill him because they believed he had cooperated with the DEA, he would have met his burden of production and the Immigration Judge's decision to exercise discretion in favor of Mr. Perafan would not have been subject to reversal. Mr. Perafan would have been entitled to asylum, even if the evidence in the case did not meet the preponderance of evidence standard of proof. By holding Mr. Perafan to the preponderance of the evidence standard, the Fourth Circuit violated this Court's ruling in *Cardozo-Fonseca* that an asylum applicant need not meet that standard.

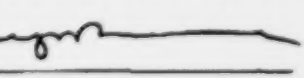
This Court should grant this petition and resolve the confusion among the Courts of Appeals as to what standard of proof must be applied in asylum cases.

## CONCLUSION

FOR THE REASONS stated herein the petitioners pray that this Court will grant this petition and review the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully Submitted,

APOLINAR PERAFAN
SALDARRIAGA, et al.,

By: 

Gary M. Bowman, Esq.,
Counsel of Record
VSB No. 28866
306 Market Street
Roanoke, Virginia 24011
Tel: (540) 343-7949
Fax: (540) 344-6144

# In The
# Supreme Court of the United States

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**APOLINAR PERAFAN SALDARRIAGA; LUZ VELASQUEZ CARMONA, ADRIANNA MENESES VELASQUEZ; MAURICIO PERAFAN VELASQUEZ,** ***Petitioners,***

**v.**

**ALBERTO GONZALES, ATTORNEY GENERAL,**
***Respondent.***

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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**APPENDIX**

---

**Gary M. Bowman, Counsel of Record**
**Gary M. Bowman, Attorney at Law**
**306 Market Street**
**Roanoke, Virginia 24011**
**(540) 343-7949**

***Counsel for Petitioner***

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**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

FILED
June 1, 2005

No. 04-1182

A76-898-250
A76-898-204
A76-898-203
A76-898-202

APOLINAR PERAFAN SALDARRIAGA; LUZ VELASQUEZ CARMONA; ADRIANNA MENESSES VELASQUEZ; MAURICIO PERAFAN VELASQUEZ,
Petitioners

v.

ALBERTO R. GONZALES, Attorney General,
Respondent

ON PETITION FOR REHEARING EN BANK

The appellants' petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc, IT IS ORDERED that the petition for rehearing en banc is denied.

Entered for a panel composed of Judge Wilkinson, Judge Williams, and Judge Traxler.

For the Court,

/s/ Patricia S. Connor
CLERK

**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

No. 04-1182

APOLINAR PERAFAN SALDARRIAGA; LUZ VELASQUEZ CARMONA; ADRIANNA MENESSES VELASQUEZ; MAURICIO PERAFAN VELASQUEZ,

*Petitioners,*

v.

ALBERTO R. GONZALES, Attorney General

*Respondent.*

On Petition for Review of an Order of
The Board of Immigration Appeals.
(A-76-898-202; A-76-898-203; A-76-898-204;
A-76-898-250)

Argued: February 1, 2005

Decided: March 29, 2005

Before WILKINSON, WILLIAMS, and TRAXLER,
Circuit Judges.

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Petition denied by published opinion. Judge Wilkinson wrote the opinion, in which Judge Williams and Judge Traxler joined.

---

## COUNSEL

**ARGUED:** Gary Michael Bowman, Roanoke, Virginia, for Petitioners. Kristin Ann Cabral, UNITED STATES DEPARTMENT OF JUSTICE, Civil Division, Washington, D.C., for Respondent. **ON BRIEF**: Peter D. Keisler, Assistant Attorney General, Carl H. McIntyre, Jr., Senior Litigation Counsel, UNITED STATES DEPARTMENT OF JUSTICE, Office of Immigration Litigation, Civil Division Washington, D.C., for Respondent.

## OPINION

WILKINSON, Circuit Judge:

In this appeal from a final order of removal, we must determine whether the Board of Immigration Appeals ("BIA") erred in rejecting petitioner's claim for political asylum. Petitioner claims to fear reprisal by Colombian drug criminals for his association with the Drug Enforcement Agency ("DEA") and his employment by one of its informants. However, petitioner has not demonstrated how his connection to the drug trade or his collaboration with the DEA stemmed from a political position he espouses. Because such a showing is vital to an asylum claim grounded in "political opinion," 8 U.S.C. § 1101(a)(42)(A) (2000), the BIA did not err in denying petitioner's application. We therefore affirm the BIA's decision and deny the petition for review.

I.

Petitioner Apolinar Perafan-Saldarriaga is a native of Colombia, where he worked as a singer and restaurateur. After performing at an October 1995 party, Perafan met Javier Cruz, who offered petitioner a job as an escort and driver. Petitioner accepted and accompanied his boss on various trips in 1995 and early 1996.

In furtherance of the employment relationship, Cruz invited petitioner to travel to Roanoke, Virginia, and work in a restaurant that Cruz was opening there. In February 1996, shortly before departing for the United States with his wife, Perafan drove Cruz to a meeting attended by two known drug dealers. At this meeting, petitioner observed an exchange of a metal box typically used to transport drugs. He noticed the same type of box while unpacking equipment at the Roanoke restaurant later in the month. Perafan worked in the restaurant for some eight months in 1996 before Cruz fired him over a labor dispute.

In the month after petitioner lost his job, the *Roanoke Times* published articles reporting that Cruz was an informant for the DEA. This report was well-founded: the DEA had arrested Cruz and his boss Leonardo Rivera for drug-related offenses in 1991. In return for leniency in sentencing, the agency had persuaded the two men to assist in investigating the cartel that employed them. The ensuing undercover scheme was successful and yielded material information concerning the criminal activity of the cartel.

In the process of winding down the operation, the DEA had secured passage, including temporary visas, to the United States for Cruz, Perafan (whom Cruz had

recently hired as a driver), and Perafan's wife. For some time after their arrival in February 1996, Cruz had continued to operate as an informant from the Roanoke restaurant. But Cruz's work was imperiled by the *Roanoke Time's* 1996 expos and his cover was completely blown when the Colombian press picked up the story from the Associated Press. The DEA moved Cruz to Miami for his safety and the restaurant ceased to operate.

Recently out of work, concerned about the reports in the local media which had confirmed Cruz's connection to the drug world, and eager to remain in the United States, Perafan approached the DEA agent in Roanoke who was involved with the undercover operation. Petitioner offered to cooperate with the agency in its investigation of Colombian drug trafficking and professed knowledge gained during his employment by Cruz. After several interviews, however, the agent in charge determined that Perafan possessed no useful information that was not already known by the DEA. In mid-1997, the officer informed petitioner and his wife that the agency could not assist them in immigration matters.

Cruz, meanwhile, had become concerned about the impact of his press exposure on his 1991 sentencing deal. Despite the publication of the *Roanoke Times* articles in the local Colombian media, Cruz returned to his native land in 1997. He continued his involvement in the drug trade there for some two years, before he was murdered by a bodyguard in 1999.

In April 1999, the Immigration and Naturalization Service ("INS") issued petitioner a notice to appear.[1] The notice alleged that Perafan was a non-immigrant under 8 U.S.C. § 1101(a)(15)(b) (2000), who had remained in the United States longer than permitted, making him removable under 8 U.S.C. § 1227(a)(1)(B) (2000). Petitioner conceded his removability, but applied for asylum under 8 U.S.C. § 1158(a)(1) (2000) for himself and derivatively his wife and children. *See* 8 C.F.R. § 208.3(a) (2001).

The Attorney General has discretion to grant asylum to applicants who establish "refugee" status. 8 U.S.C. § 1158(b)(1) (2000). A "refugee" is one "who is unable or unwilling to return to" his native country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.* § 1101(a)(42)(A). Perafan alleged that his employment by Cruz, an outed DEA informant, put him at risk of reprisal by Colombian drug dealers and made him a "refugee" under this statutory definition.

The removal proceedings and the asylum petition were referred to an Immigration Judge ("IJ"). The IJ heard testimony and issued a decision on July 30, 2001. The IJ found that Perafan had successfully demonstrated a well-founded fear of reprisal against him by drug dealers in Colombia for his association with Cruz. Moreover, the retaliation would be "on account of [a] political opinion," as § 1101(a)(42)(A) requires. The judge therefore granted Perafan asylum.

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[1] The agency was still known by this acronym during the administrative proceedings in this case. We therefore use the term "INS," despite the fact that the agency has since been renamed and reorganized. *See* 6 U.S.C.A. § 291 (West Supp. 2004); 8 C.F.R. § 1.1 (2005).

A panel of the BIA reversed. A majority of the panel found implausible Perafan's allegation that he would face retaliation at the hands of drug dealers in Colombia on account of a protected statutory ground. The BIA therefore entered an order rejecting the asylum claim. Petitioner now seeks review of that order in this court.

II.

Circuit courts hear appeals from the BIA's final orders of removal.[2] *See* 8 U.S.C. § 1252(a)(1), (b)(2) (2000); *Huaman-Cornelio v. BIA*, 979 F.2d 995, 999 (4th Cir. 1992). When the BIA has adjudged asylum eligibility, our review of its decision is narrow. *See* 8 U.S.C. § 1252(b)(4) (2000); *Belbruno v. Ashcroft*, 362 F.3d 272, 284 (4th Cir. 2004). We determine only whether the BIA's decision is "manifestly contrary to the law and an abuse of discretion." § 1252(b)(4)(D). When

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[2] The government contends that this court is without jurisdiction. Because the IJ decided the case on the asylum issue, he declined to address petitioner's alternative application for voluntary departure. *See* 8 U.S.C. § 1229c (2000). However, the BIA's reversal on the asylum issue revived the voluntary departure application. The BIA accordingly remanded to the IJ "to allow [petitioner] an opportunity to apply for voluntary departure." The government argues that, because this matter is pending before the IJ, federal jurisdiction, which is limited to review "of a final order of removal," is lacking. *Id.* § 1252(a)(1). Our sister circuits have already considered whether a BIA order denying relief from deportation, but remanding the case for voluntary departure proceedings or other subsidiary determinations, is immediately appealable. *See Del Pilar v. United States*, 326 F.3d 1154, 1156-57 (11th Cir. 2003) (per curiam); *Castrejon-Garcia v. INS*, 60 F.3d 1359, 1361-62 (9th Cir. 1995); *Perkovic v. INS*, 33 F.3d 615, 618-20 (6th Cir. 1994). These precedents indicate that federal jurisdiction is proper in such circumstances and, finding their reasoning persuasive, we apply this conclusion here.

the BIA has rejected an asylum claim, we therefore uphold its decision unless the petitioner has presented evidence "so compelling that no reasonable factfinder could fail to find" the elements required for asylum in petitioner's favor. *INS v. Elias-Zacarias* 502 U.S. 478, 483-84 (1992); *Belbruno*, 362 F.3d at 278; *Huaman-Cornelio*, 979 F.2d at 999. These standards reflect the BIA's expertise in the area of immigration, its status as the Attorney General's designee in deportation decisions, and the special caution we observe in matters relating to foreign relations, for which the other branches of our government bear primary responsibility. *See Huaman-Cornelio*, 979 F.2d at 999; *M.A. v. INS*, 899 F.2d 304, 313-14 (4th Cir. 1990) (en banc).

III.

Perafan alleges that the BIA erred by overturning the IJ's decision to grant him asylum. He contends the BIA should have respected the IJ's findings concerning witness credibility and credited the IJ's conclusion that petitioner's fear of reprisal in Colombia was well-founded. By failing to do so, he says, the BIA exceeded its own scope of review and impermissibly overrode factual determinations committed to the IJ. *See* 8 C.F.R. § 1003.1(d)(3) (2005). Petitioner reiterates to us the ubiquity of drug crime in Colombia and describes the violent tactics of drug dealers there. He maintains that he will be targeted because of his association with Cruz if he must return to Colombia. He asks that we reject the BIA's contrary holding.

Quite apart from the question of petitioner's apprehensions of reprisal, his asylum claim founders on more fundamental grounds. For in addition to proving a well-founded fear of persecution, a party seeking refugee status must also demonstrate that the persecution is "on

account of" one of the protected grounds – "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A) (2000). To satisfy the statutory test, an applicant must make a two-fold showing. He must demonstrate the presence of a protected ground, and he must link the feared persecution, at least in part, to it. See *Elias-Zacarias*, 502 U.S. at 482-83; *Rivera-Moreno v. INS*, 213 F.3d 481, 486 (9th Cir. 2000).

When the protected ground is political opinion, the first showing is prototypically met by evidence of verbal or openly expressive behavior by the applicant in furtherance of a particular cause. *See, e.g., Camara v. Ashcroft*, 378 F.3d 361, 364 (4th Cir. 2004) ("demonstrating with students" and participating in a "protest march" for ethnic rights demonstrates political opinion for asylum purposes). Less overtly symbolic acts may also reflect a political opinion. See *Briones v. INS*, 175 F.3d 727, 728-29 (9th Cir. 1999) (en banc) (holding that applicant's provision of material information concerning a political insurgency reflected political opinion). But whatever behavior an applicant seeks to advance as political, it must be motivated by an ideal or conviction of sorts before it will constitute grounds for asylum. Because of this requirement, we recently reemphasized that "[f]ears of retribution over purely personal matters or general conditions of upheaval and unrest do not constitute cognizable bases for granting asylum." *Belbruno*, 362 F.3d at 284 (quoting *Huaman-Cornelio*, 979 F.2d at 1000). Indeed, actions motivated by an employment interest, *see Adhiyappa v. INS*, 58 F.3d 261, 267 (6th Cir. 1995), or other "personal benefit," *see Perlera-Escobar v. Executive Office for Immigration*, 894 F.2d 1292, 1298 (11th Cir. 1990) (per curiam), do not merit protection as a political refugee.

In appealing his denial of asylum, petitioner reiterates the unfortunate predicament he faced when he found himself unemployed and tainted by association with Cruz, a known DEA informant. Yet Perafan never suggests that his initial acceptance of Cruz's job offer, his continued employment after it became clear that Cruz trafficked in narcotics, his decision to travel to Roanoke pursuant to his employment, and his attempt to avoid removal from the United States by cooperating with the DEA were motivated by anything other than self-regarding ends.

Petitioner has not argued that his decisions in this course of action were grounded in principle, inspired by altruism, or intended to advance a cause, as a political opinion applicant must show. And, even if we entertained the generous assumption that Perafan's cooperation with the DEA stemmed from a disapproval of the drug cartel, such a stance on his part still could not constitute a political opinion under § 1101(a)(42)(A). Indeed, to credit such disapproval as grounds for asylum would enlarge the category of political opinions to include almost any quarrel with the activities of almost any organization.

Not only would the proliferation of asylum grants under this expansive reading interfere with the other branches' primacy in foreign relations, *see M.A.*, 899 F.2d at 313-14, it would also strain the language of § 1101(a)(42)(A). The statute requires persecution to be on a discrete basis and to fall within one of the enumerated categories. This particularity demonstrates that the asylum statute was not intended as a panacea for the numerous personal altercations that invariably characterize economic and social relationships. *See Huaman-Cornelio*, 979 F.2d at 1000; *see also Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 352 (5th Cir. 2002). Even when a

widespread conflict between a foreign government and an opposing non-state actor overshadows these relationships, as is the case in Colombia, a party seeking political opinion asylum must do more than describe how this overshadowing has affected his life. To receive protection as a refugee, he must also demonstrate that he has a particular stake in the conflict and a position on how governance in that country ought to occur. *Accord Cruz-Navarro v. INS*, 232 F.3d 1024, 1030 (9th Cir. 2000) (rejecting asylum claim for applicant who "did not testify that he had particular political beliefs or opinions, much less political motives" for his actions).

For an applicant who has been forced to declare his allegiance in an expressly political struggle between an organized insurgency and government forces, demonstration of a political opinion may be more straightforward. *See Briones*, 175 F.3d at 728-29. But when, as here, the applicant has not taken sides in such manner – much less under duress – and the conflict, though ubiquitous, is not aimed at controlling the organs of state, an applicant cannot merely describe his involvement with one side or the other to establish a political opinion. *See Estrada-Escobar v. Ashcroft*, 376 F.3d 1042, 1047 (10th Cir. 2004) (rejecting asylum for applicant who "fails to link his persecution to anything other than his status as a police officer" involved in civil strife); *Rivera-Moreno*, 213 F.3d at 486 ("[i]t is clear that persecution for failure to contribute nursing services [to guerrillas] is not a protected ground under § 1101(a)(42)(A)"); *Cruz-Diaz v. INS*, 86 F.3d 330, 332 (4th Cir. 1996) (per curiam) ("The guerillas' conscription of [applicant] as a child, his fleeing from the guerrillas, and his hiding from both the guerrillas and the army . . . does not establish a political opinion on his part.") Here the absence of a political end, even from petitioner's own description of his motivations, demonstrates that his best

evidence amounts to no more than a description of how the conflict in Colombia has impacted his life. Because he has not further explained how his involvement with this conflict stems from a political opinion he has adopted, he cannot be entitled to the protection of asylum.

Finally, it bears mention that, even if petitioner were found to have manifested a political opinion as the statute requires, there is no indication that the cartel members would persecute him *in response to* that manifestation. Yet such a nexus between political opinion and feared persecution, required by the statutory phrase "on account of," § 1101(a)(42)(A), is no less an important element of an asylum claim than the applicant's display of a political opinion in the first place. *See Elias-Zacarias*, 502 U.S. at 482-83; *Huaman-Cornelio*, 979 F.2d at 1000. Indeed, to secure refugee status, "an applicant must tie the persecution to a protected cause . . . [and] show the persecutor had a protected basis . . . in mind in undertaking the persecution." *Rivera-Moreno*, 213 F.3d at 486 (citation omitted) (emphasis added). Thus, even if Perafan's cooperating with the DEA were somehow to be deemed sufficiently political, his protection as a refugee would not necessarily follow. For the inscrutability of the political opinion he claims implies that any persecution he fears is due to the fact of his cooperation with the government, rather than the content of any opinion motivating that cooperation. *See Adhiyappa*, 58 F.3d at 268 (rejecting asylum claim where "it was [applicant's] status as an informant, not his political opinion," that provoked persecution by political separatists).

## IV.

We appreciate Perafan's desire to remain outside Colombia and away from the foment of the drug trade. But statutes sometimes require saying no, even to a hard luck case. We are not empowered to bestow the privilege of residing in the United States in violation of the standards that Congress has announced in § 1101(a)(42)(A). Being involved in the drug wars of a foreign country with their webs and patterns of violence and recrimination is not the same thing as being persecuted on account of a political opinion. Applying the statute to the facts before us, in light of the deference we accord administrative asylum determinations, we find no error in the BIA's decision not to grant Perafan refugee status. The order of the BIA is therefore affirmed and the petition for review is

*DENIED.*

**U.S. DEPARTMENT OF JUSTICE**
**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**
Falls Church, Virginia 22041

Decision of Board of Immigration Appeals

Files: A76 898 202 – Arlington Date: JAN 13 2004
A76 898 203
A76 898 204
A76 898 250

In re: APOLINAR PERAFAN SALDARRIAGA
LUZ VELASQUEZ CARMONA
ADRIANNA MENESES VELASQUEZ
MAURICIO A. PERAFAN VELASQUEZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS:
Gary M. Bowman, Esquire

ON BEHALF OF DHS:
Karl D. Klauck, Assistant District Counsel

CHARGE:

Notice:
Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)]-
In the United States in violation of law (all respondents)

APPLICATION:
Asylum, withholding or removal, protection under the Convention Against Torture, voluntary departure

The Department of Homeland Security ("DHS," formerly the Immigration and Naturalization Service) has filed an appeal from a decision, dated July 30, 2001, in which an Immigration Judge granted the respondents asylum. The lead respondent claimed he fears being targeted in Colombia as a result of his employment by a drug-dealer who worked as an informant for the DEA. Upon review, we find that the respondent[3] did not establish a well-founded fear of persecution in Colombia. Because we find the respondent ineligible for asylum we do not address the DHS argument that he did not establish that he merits an exception to the 1-year-time bar on filing for asylum. The appeal will therefore be sustained and the record will be remanded to allow the respondents to apply for voluntary departure.

[3] The lead respondent will be referred to throughout this decision as the respondent; the claims of the other respondents are either derivative of the lead respondent's claim or similar to his.

The respondent testified that he came to the United States with a tourist visa, in order to perform labor as a cook for an individual whom he knew to be a major drug trafficker[4] (Tr. at 30, 64). The respondent indicated that he personally had nothing to do with drug trafficking, that he learned of the drug trafficking only days before entering the United States, and that he feared retaliation from his employer or his colleagues, so he did nothing to quit his job or to inform the authorities of the fact that the restaurant he worked in was associated with drug trafficking. Eventually the respondent discovered that his employer was an informant for the DEA as well as being a drug trafficker. The respondent's employer was featured in a newspaper article detailing his connections to the DEA. Shortly thereafter, the respondent approached the DEA. According to the testimony of a DEA agent, the respondent at first denied any knowledge of his employer's drug trafficking (Tr. at 172). Later, he admitted to one occasion on which he drove his employer

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[4] In the discussion of the discretionary aspects of this case, the Immigration Judge made several unsupported statements. The Immigration Judge's statement that the respondent entered the country legally with a temporary visa issued to him by the DEA is, while not incorrect, irrelevant in light of the fact that the respondent did not know he was entering on a DEA visa. *See* Tr. at 29-30, *cf.* Tr. at 38, 42, 171. The Immigration Judge's statement that there is no indication of fraud or misrepresentation on the part of the respondent is also unsupported by the record. It is fairly clear the respondent realized his visa did not allow him to work in the United States, and he certainly knew that his visa was procured for him by a drug trafficker (Tr. at 30). The Immigration Judge's implication that the respondent did not know he was working for a drug dealer and was caught up, unbeknownst, in events beyond his control is also unsupported by the record. *See* Tr. at 23; 172-3 (respondent knew details of drug trafficking before he came to the United States and learned his employer was working with the DEA, but did not admit his knowledge until a second visit to the DEA when he was told that the DEA would not help him if he did not tell them what he knew).

to a meeting where drug trafficking was discussed (Tr. at 173, 191).

According to the DEA agent, the respondent's information was redundant and not very useful. The agent testified that the type of visa the respondent hoped to obtain (179-180) was rarely granted and is never granted in a case like the respondent's, where the specific threat is not clearly articulated (Tr. at 179-180).

Upon review of this case, we find that the record does not support a finding that the respondent has a well-founded fear of persecution in Colombia on account of an enumerated ground. The evidence in the record indicates that many Colombians work in law enforcement or otherwise engage in activities that narcotraffickers disapprove of, and the majority of those individuals do not encounter the persecution the respondent claims to fear. We recognize that conditions in Colombia are difficult, in many areas, for the law-abiding population there, but general conditions of strife are generally insufficient to establish a claim for asylum. Further, the respondent's speculation that he was connected in the minds of the narcotraffickers with the DEA is not supported by persuasive evidence. The respondent was not mentioned in the newspaper report in which he learned that his employer was a DEA informant, or in any subsequent report (Tr. at 52). The respondent's wife testified that the narcotraffickers could not know if the respondent was involved with drugs or not, so of course they would assume he was (Tr. at 77). However, such a negative assumption was apparently not made in regard to individuals with even greater associations with drugs than the respondent (Tr. at 178).

We do not find the testimony of the witnesses in this case regarding alleged suspicious activities in Colombia to be sufficiently detailed or convincing to be sufficient to meet his burden of proof. As the Immigration Judge stated, all that was presented was 'double and triple hearsay.' Further, the respondent's allegations that he is certain he would be targeted appears to be an embellishment that evolved over time. *Cf.* Tr. at 81 and 200-201. In this regard, we note that the testimony in this case was often unclear or inconsistent about recent important events and dates. Inconsistencies related to peripheral details like the payment the respondent and his wife received (*cf.* Tr. at 35, 98), and also to central issues like whether he would have come to the United States if he knew his employer was a drug dealer (*cf.* Tr. at 23, 64) and when he admitted to knowledge of the criminal activity of his employer (*cf.* Tr. at 23, 172-3). We disagree with the Immigration Judge that these inconsistencies were explainable or understandable. Rather, the testimony in this case was clearly insufficiently accurate to persuade us that the respondent would be targeted in Colombia. He did not rebut testimony in the record that discussed the relative safety of some parts of Colombia, and he did not rebut testimony that other individuals, more closely involved with his employer than himself, had returned to Colombia and not been harmed. *See* Tr. at 178. Finally, his admitted voluntary association with a narcotrafficker, and his failure to volunteer any information to authorities until he felt it was in his own best interest, severely undermines the persuasiveness of his testimony. For these reasons, we find the respondent did not convincingly make the case that he would be targeted in Colombia as an imputed informant.

For analogous reasons, we find that the respondent has not provided evidence sufficient to meet his burden of demonstrating that he is more likely than not to be tortured by, or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity if he were to return to Colombia. *See* 8 C.F.R. §§ 208.16(c)(4), 208.18(a)(1). He consequently has not established eligibility for protection in the United States under the Convention Against Torture, inasmuch as he has not shown that it is more likely than not that he would be tortured in Colombia. *See* Article 3 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature Dec. 10, 1984, G.A. Res. 39/46, annex, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) (entered into force June 26, 1987; for the United States Apr. 18, 1988) ("Convention Against Torture").

In sum, we find that the respondent did not establish eligibility for the relief sought. We do not dispute that the respondent has submitted evidence that Colombia has many difficulties with criminal groups, some of them very powerful. Nor do we dispute that the respondent has (albeit freely) associated himself with those groups and therefore he may have a subjective fear of retaliation from those groups. However, based upon the testimony in the record and the background evidence submitted, we find that he has not met the relevant burdens of proof. However, we will remand the record to allow the respondents an opportunity to apply for voluntary departure.

ORDER: The appeal of the Department of Homeland Security is sustained.

FURTHER ORDER: The record is remanded to the Immigration Court to allow the respondents an opportunity to apply for voluntary departure.

FOR THE BOARD

Board Member Juan P. Osuna respectfully dissents without separate opinion and would affirm the Immigration Judge for the reasons set forth in his well-reasoned decision.

**UNITED STATES DEPARTMENT OF JUSTICE**
**EXECUTIVE OFFICE OF IMMIGRATION REVIEW**
United States Immigration Court
901 North Stuart Street, Suite 1300
Arlington, Virginia 22203

IN THE MATTER OF:

| | |
|---|---|
| PERAFAN SALDARRIAGA, Apolinar (LEAD) | ) |
| VELASQUEZ CARMONA, Luz | ) |
| MENESES VELASQUEZ, Adrianna | ) |
| PERAFAN VELASQUEZ, Mauricio | ) |
| Respondents | ) |

IN REMOVAL PROCEEDINGS

File Nos.: A76 898 202
A76 898 203
A76 898 204
A76 898 250

CHARGE:

Section 237(a)(1)(B) of the Immigration and Nationality Act (INA or Act), as an alien who remained in the United States longer than permitted.

APPLICATIONS:

Asylum, pursuant to INA § 208(a);
Withholding of Removal, pursuant to INA § 241(b)(3);
Withholding of Removal under the Convention Against Torture (Torture) Convention), pursuant to 8 C.F.R. § 208.16 (2001);
Voluntary Departure, pursuant to INA § 240B.

## APPEARANCES

ON BEHALF OF RESPONDENT:

Gary M. Bowman, Esq.
204 S. Jefferson Street, 12th floor
Roanoke, VA 24011

ON BEHALF OF THE SERVICE:

Assistant District Counsel
Immigration and Naturalization Service
4420 N. Fairfax Drive, Room 500
Arlington, VA 22203

## WRITTEN DECISION OF THE IMMIGRATION JUDGE

This is a removal proceeding instituted against the above-named Respondents in accordance with Section 240 of the Immigration and Nationality Act. These proceedings commenced when the Immigration and Naturalization Service (INS or Service) filed Notices to Appear (NTA's) with the Immigration Court on May 4, 1999. The Service charges Respondents with removability pursuant to INA § 237(a)(1)(B), as aliens who unlawfully remained in the United States longer than was permitted by their nonimmigrant visas. Respondents are a family unit consisting of a husband, a wife, and their two children, all natives and citizens of Colombia. The lead Respondent and his wife entered the United States at Miami, Florida, on February 16, 1996, as non-immigrant visitors pursuant to Section 101(a)(15)(B) of the Act with permission to remain in the country until August 16, 1996. The lead Respondent's two children entered the United States at Miami, Florida, on December 14, 1998, as non-immigrant B-2 visitors.

At a Master Calendar Hearing on August 20, 1999, Respondents, through counsel, acknowledged proper service of the NTA's, admitted the factual allegations contained therein, and conceded removability as charged. Based on these admissions, the Court finds that each Respondent's removability has been established by clear and convincing evidence. See 8 C.F.R. § 240.8(a) (2001).

Prior to the initiation of these removal proceedings, the lead Respondent submitted an application for political asylum on behalf of his family. That application was referred to this Court along with the NTA's. A spouse or child of an alien who is granted asylum may, if not otherwise eligible for asylum, be granted the same status as the applicant. See 8 C.F.R. § 208.3(a) (2001). Respondents seek asylum, pursuant to INA § 208(a), withholding of removal, pursuant to INA § 241(b)(3), and withholding of removal under the Torture Convention, pursuant to 8 C.F.R. § 208.16 (2001). Because the lead Respondent filed the asylum application on behalf of his family, this decision will focus primarily on the lead Respondent. Unless otherwise noted, Respondent hereinafter refers to the lead Respondent.

For the reasons discussed below, the Court will grant relief in the form of asylum.

## STATEMENT OF FACTS

### *A. Respondent's Application for Asylum*

Respondent bases his application for asylum on imputed political opinion. He claims that he would be persecuted if he returned to Colombia because drug traffickers would impute a political opinion to him based on his employment by Javier Cruz (Cruz), a known

informant for the United States Drug Enforcement Agency (DEA).

The Respondent's application for asylum stated that he worked for Cruz in Colombia and that Respondent and his wife came to the United States with Cruz in 1996 to work in his restaurant. In August 1996, Cruz was exposed in the media as a former drug trafficker turned DEA informant. Respondent claimed to fear retaliation by drug gangs in Colombia who had been affected by the DEA investigation. He stated that his family in Colombia had received threats concerning his involvement with Cruz and that the Colombian police would not be able to protect him if he returned. He also claimed that he cooperated with the DEA investigation of Cruz and was told he would be given legal immigration status in return. When he later realized he would not be given legal status, he filed the asylum application.

The application also included two front page articles from the Roanoke Times, dated November 8, 1996, and November 9, 1996. Both articles feature photographs of Javier Cruz and describe his arrest in connection with a 1987 shooting death, his involvement with the drug trade from Colombia, and his subsequent cooperation with the DEA. Additional newspaper articles from early 1997 report developments in Cruz's trial in Roanoke.

*B. Respondent's Testimony*

Respondent testified on February 9, 2000, that he had worked as a singer in Colombia until he was hired by Javier Cruz in October 1995. Respondent worked for Cruz as a driver, apparently both in connection with Cruz's ranch and for members of Cruz's family, until early 1996, when Cruz offered Respondent and his wife a

job at his restaurant in Roanoke, Virginia. In February 1996, some fifteen days before they departed for the United States, Respondent drove Cruz to a meeting at which he recognized at least two known drug traffickers. He had seen their pictures on local television as part of a story about drug trafficking. Respondent testified that he has never been involved in the drug trade, and before that meeting he had no idea that Cruz was involved in drug trafficking. Nonetheless, because he wanted the opportunity to work in the United States, he and his wife accompanied Cruz to the United States later that month.

Respondent testified that he and his wife were employed by Cruz in Roanoke for eight months. He testified that he and his wife worked in Cruz's restaurant as cooks, but they quit in September 1996 because of long hours and low pay. Shortly after that, articles appeared in the Roanoke Times describing Cruz as a DEA informant. Respondent testified that he feared retaliation in Colombia for his connection to Cruz, so he contacted the DEA office in Roanoke and offered to help with the investigation in exchange for protection. He met with Special Agent Dan Lincoln (Agent Lincoln) in January 1997 and identified the two men he had seen at the February 1996 meeting with Cruz. He also identified a box that Cruz had brought to the United States from Colombia, which Respondent deduced had been brought as a demonstration of how a shipment of drugs would be transported. Respondent was unable to offer any additional information. Respondent testified that at this meeting Agent Lincoln offered to help with his immigration status. Respondent returned to the DEA office several times to ask about his immigration status but received no definite answer until the final visit, in July or August 1997, at which time he was told the DEA could not help him.

Respondent testified that he was afraid to return to Colombia because he believed that Cruz told the drug traffickers that Respondent had been the informant rather than Cruz. He testified that in 1998 a group of men appeared at his sister-in-law's house in Buga Valle, his home town, and threatened to kill Respondent when he returned. A group of men also came to his mother's house in Buga Valle and asked about him, and Respondent advised his mother to move to Bogotá for her own safety. Respondent also testified that he heard Cruz had been killed some time after returning to Colombia and that members of Respondent's family had attended the funeral.

Respondent briefly testified again on December 4, 2000, that he feared Cruz had told the drug bosses Respondent was the informant, and that he could think of no other reason why anyone would threaten him or his family.

*C. Testimony of Respondent Luz Velasquez Carmona, Lead Respondent's Wife*

Mrs. Velasquez Carmona testified on February 9, 2000, that she and her husband came to the United States on February 16, 1996, and that they worked for Cruz in the Roanoke restaurant as cooks until September 7, 1996, when they quit over low pay. She testified that her sister in Colombia saw reports in the local media that Cruz had been an informant, and that people were asking if Respondent still worked for Cruz. She testified that because she and Respondent were afraid, they went to the DEA for protection. They were told the DEA would help them, but after a year they were finally told no help was available.

*D. Testimony of Adiela Velasquez Carmona, Lead Respondent's Sister-in-law*

Ms. Velasquez Carmona testified on December 4, 2000, that she came to the United States from Colombia in January 1998 with Respondent's two children. She had been caring for the children while Respondents were in the United States. She testified that in September 1997 a man came to her place of employment and asked whether Respondent and his wife still worked for Cruz. This individual told Ms. Velasquez Carmona that Cruz was an informant for the DEA. In mid-September, three men came to her house and asked where they could find Respondent. She told them she didn't know, but they insisted she must know because she was taking care of his children. They left but threatened to return. She testified that in October 1997 the same men returned and again asked how they could find Respondent. She again told them she didn't know, and with "strong words" they insisted that one way or another she would tell what she knew. She testified that shortly after that, two men on a motorcycle stopped her son as he left school and asked if he was Respondent's son. When he said he was not, they asked how they could find Respondent's son.

Ms. Velasquez Carmona testified that after these events she removed the children from school, gave her employer notice that she wanted to quit, and began preparations to come to the United States. She reported these events at the local police station but was told nothing could be done without proof. She testified that in late October 1997 the same men returned to her house and told her that if she did not open her mouth they would "shut it up forever." She then moved to her brother's house and remained there until she left Colombia for the United States. She testified that she had seen the men before but did not know their names or backgrounds. She

also testified that after she moved to her brother's house, some men began asking Respondent's mother questions about Respondent's location. As a result, Respondent's mother moved to Bogotá from Buga Valle, probably in February 1998.

Ms. Velasquez Carmona also identified four documents from Colombia as the official death record of Cruz. They referred to a violent death on August 5, 1999.

*E. Affidavit of Esther Mariel Saldarriaga, Lead Respondent's mother*

On December 4, 2000, Respondent, through counsel, introduced into evidence an affidavit from Esther Mariel Saldarriaga, Respondent's mother, who declared that she had moved from Buga Valle to Bogotá following threats from unknown people who came to her house asking for her son. According to her affidavit, they asked where he was, whether he was still working for Cruz, and also for his address in the United States. She described the men as very rude and stated they threatened her life if her son did not appear.

*F. Testimony of Agent Lincoln*

Special Agent Lincoln testified on December 4, 2000, by telephone from his office in Norfolk, Virginia. He testified that in 1991 the DEA arrested two Colombians, Cruz and Leonardo Rivera, who resided in Roanoke. Pursuant to an agreement with the Attorney General, the agency kept the arrests quiet and began using the two men to gain information about drug traffickers. In September 1992 the DEA sent Cruz to Colombia as part of a money laundering sting operation known as "El Cid." In 1996, the DEA prepared to bring the operation to a close and move Cruz back to Roanoke. Agent

Lincoln asked Cruz if anyone associated with him in Colombia would be in danger if the operation had to be closed suddenly. Cruz felt his household staff might be in danger, so the DEA arranged for temporary visas for four people, including Respondent and his wife.

Agent Lincoln testified that the DEA continued to use Cruz as a cooperating informant until the front page article appeared in the Roanoke Times in late 1996. The article was picked up by the Associated Press and reprinted in El Tiempo, a major newspaper in Bogotá, Colombia. He testified that Cruz relocated to Miami, Florida and eventually returned to Colombia because he was afraid the negative publicity would force the judge to give him a longer sentence in the original drug charges.[5] According to an investigation by the Colombian police, Cruz told the traffickers that the other Colombian arrested in 1991, Rivera, had been the informant. Cruz then operated with the traffickers for another year or more, until he was killed by one of his own bodyguards over a dispute with a rival drug faction.

Agent Lincoln testified that Respondent came to the DEA office in Roanoke after Cruz had been exposed in the local paper. He originally considered Respondent to be a potential witness, but Respondent could only identify one individual, Benito Chavez, whom he had seen with Cruz. He later explained to Respondent that he did not believe he was in danger in Colombia and that it was unlikely the DEA could extend their visas but that he would check with the INS. Respondent returned to the DEA office several times to inquire his immigration status, and Agent Lincoln told him that the DEA had no grounds to extend his visa. He asked Respondent if there

[5] Since 1991, Cruz had been cooperating with the DEA in exchange for a lighter sentence but had not yet been sentenced on the original 1991 charges.

had been any threats against his family but was told only that some men had asked about him at his family's house. Agent Lincoln did not believe Respondent would be in danger if he returned to Colombia, in part because nothing had happened to other employees of Cruz who stayed in the country or to Cruz's family. He also testified that drug traffickers operate throughout Colombia and that drug related violence was significant, though somewhat less common in the cities than it had been several years earlier. He agreed it was difficult to separate drug trafficking and political insurgency but could not testify about the level of Colombian government involvement with drug trafficking across the country. In his experience, the government had been cooperative in dealing with the DEA.

## LEGAL ANALYSIS

Respondent's asylum application will also be treated as a request for withholding of removal, pursuant to INA § 241(b)(3) of the Act, and for protection under the Torture Convention pursuant to 8 C.F.R. § 208.16 (2001). For the reasons discussed below, the Court will grant relief in form of asylum, and will therefore not reach withholding of removal under INA § 241(b)(3) or the Torture Convention.

### *Asylum*

#### *1. Applicable Standards*

An alien requesting asylum bears the evidentiary burden of proof and persuasion in connection with any application under section 208 of the Act. See 8 C.F.R. § 208.13(a); see also Matter of S-M-J, 21 I&N Dec. 722 (BIA 1997); Matter of Acosta, 19 I&N Dec. 211, 215 (BIA 1985), modified on other grounds, Matter of

Mogharrabi, 19 I&N Dec. 439, 446 (BIA 1987). To qualify for a grant of asylum, an alien must credibly demonstrate that he or she is a "refugee" within the meaning of section 101(a)(42)(A) of the Act. See INA § 208(b)(1); see also INA § 101(a)(42)(A); 8 C.F.R. § 208.13(a). As such, the alien must demonstrate that the alleged persecution or well-founded fear of persecution is "on account of [his or her] race, religion, nationality, membership in a particular social group, or political opinion." INA § 101(a)(42)(A). Additionally, the alien must establish that he or she is unable or unwilling to avail himself or herself of the protection of the alien's country of nationality or last habitual residence. Id. Moreover, the alien's fear of persecution must be country-wide. See Matter of Acosta, supra, at 235; see also Matter of Fuentes, 19 I&N Dec. 658 (BIA 1988). The alien must demonstrate that he or she is eligible for asylum as a matter of discretion. See INA § 208(b)(1); see also INS v. Cardoza-Fonseca, 480 U.S. 421, 423 (1987). Finally, the alien must have filed his asylum application within one year of his arrival in the United States. See INA § 208(a)(2)(B); 8 C.F.R. § 208.4(a)(2) (2001).

*2. Credibility*

In all applications for asylum, the Court must make a threshold determination of the alien's credibility. See Matter of O-D-, 21 I&N Dec. 1079 (BIA 1998); see also Matter of Pula, 19 I&N Dec. 467 (BIA 1987). An applicant's own testimony is sufficient to meet his or her burden of proving his or her asylum claim if it is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis of his or her fear. See Matter of Dass, 20 I&N Dec. 120, 124 (BIA 1989); see also 8 C.F.R. § 208.13(a). However, testimony is not considered credible when it is inconsistent, contradictory with current country conditions, or

inherently improbable. See Matter of S-M-J-, supra. While omissions of facts in an asylum application or during testimony might not, in themselves, support an adverse credibility determination, the omission of key events coupled with numerous inconsistencies may provide a specific and cogent reason to support an adverse credibility finding. See Matter of A-S-, 21 I&N Dec. 1106 (BIA 1998).

*3. Corroboration*

In determining whether an asylum applicant has met his or her burden of proof, the Board of Immigration Appeals (BIA or Board) has recognized the difficulties that an alien may face in obtaining documentary or other corroborative evidence to support the alien's claim of persecution. See Matter of Dass, supra. As such, unreasonable demands are not placed on an asylum applicant to present evidence to corroborate particular experiences (e.g., corroboration from the persecutor). See Matter of S-M-J-, supra. In fact, lack of corroborative evidence is not necessarily fatal to an asylum application, as uncorroborated testimony that is credible, persuasive, and specific may be sufficient to sustain the burden of proof to establish a claim for asylum. See 8 C.F.R. § 208.13(a); see also Matter of Mogharrabi, supra, at 444-445.

However, where it is reasonable to expect corroborating evidence for certain alleged facts pertaining to the specifics of an applicant's claim, such evidence should be provided. See Matter of S-M-J-, supra; see also Matter of M-D-, 21 I&N Dec. 1180 (BIA 1998). If such evidence is unavailable, the applicant must explain its unavailability, and the Immigration Judge must ensure that the applicant's explanation is included in the record. See Matter of S-M-J-, supra. The absence of such

corroboration can lead to a finding that an applicant has failed to meet his or her burden of proof. Id. at 725.

*4. Persecution*

The meaning of "persecution," as developed through United States case law, contemplates harm or suffering inflicted upon an individual in order to punish him or her for possessing a belief or characteristic a persecutor seeks to overcome. See Matter of Acosta, supra, at 223. Persecution within the meaning of the Act does not encompass all treatment that society regards as unfair, unjust, or even unlawful or unconstitutional. See Matter of V-T-S-, 21 I&N Dec. 792 (BIA 1997). Persecution is not limited to physical harm, but may include mental suffering or even economic deprivation so severe as to constitute a threat to an individual's life or freedom. Id. at 222. Prosecution for violating laws of general applicability does not constitute persecution, unless the punishment is imposed for invidious reasons or is grossly disproportionate to the proscribed conduct. Id.

*a. Past Persecution*

An applicant shall be found to be a refugee on the basis of past persecution if the applicant can establish that he or she has suffered persecution in the past in the applicant's country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to, or avail himself or herself of the protection of, that country owing to such persecution. See 8 C.F.R. § 208.13(b)(1) (2001). An applicant who is found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim. If the applicant's fear of persecution is

unrelated to the past persecution, the applicant bears the burden of establishing that the fear is well-founded. Id.

*b. Well-Founded Fear of Persecution*

An applicant has a well-founded fear of persecution if: (1) the applicant has a fear of persecution in his or her country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion; (2) there is a reasonable possibility of suffering such persecution if he or she were to return to that country; and (3) he or she is unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such fear. See 8 C.F.R. § 208.13(b)(2)(i) (2001). In general, the applicant's fear should be considered well-founded if the applicant can establish, to a reasonable degree, that his or her continued stay in that country has become intolerable for the applicant on the basis of one of the enumerated grounds, or would for the same reasons, be intolerable if he or she returned there. See Handbook on Procedures and Criteria for Determining Refugee Status, Office of the United Nations High Commissioner for Refugees, ¶ 42, p. 12-13. (Geneva, January 1992) ("Handbook"). An applicant does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, if under all the circumstances it would be reasonable to expect the applicant to do so. See 8 C.F.R. § 208.13(b)(2)(ii) (2001).

To establish a well-founded fear of persecution, an applicant must present credible testimony that demonstrates that his fear of harm is of a level that amounts to persecution, that the harm is on account of a

protected characteristic, that the persecutor could become aware or already is aware of the characteristic, and that the persecutor has the means and inclination to persecute. See Matter of Mogharrabi, supra, at 446; see also Matter of Acosta, supra, at 226. A well-founded fear of persecution must be both subjectively genuine and objectively reasonable. See INS v. Cardoza-Fonseca, supra. To demonstrate a subjective fear of persecution, an applicant must demonstrate a genuine apprehension or awareness of the risk of persecution. See Matter of Acosta, supra, at 221. The objective component requires a showing by credible, direct, and specific evidence in the record that the alien's fear of persecution is reasonable. See DeValle v. INS, 901 F.2d 787, 790 (9th Cir. 1990).

*c. On Account of*

An applicant for asylum must demonstrate that he or she is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of, the protection of his country, because of persecution or a well-founded fear of persecution "on account of" race, religion, nationality, membership in a particular social group, or political opinion. See INA § 101(a)(42)(A); see also 8 C.F.R. § 208.13(b)(2)(i)(A) (2001). Even treatment that is regarded as "morally reprehensible" is not "persecution" within the meaning of the Act unless it occurs "on account of" one of the five enumerated grounds in the Act. See Matter of T-M-B-, 21 I&N Dec. 775 (BIA 1997). While an applicant need not directly prove the motive of his or her persecutors, some evidence of it is required, whether direct or circumstantial. See INS v. Elias-Zacarias, 502 U.S. 478, 483 (1992).

*5. Discretion*

Statutory and regulatory eligibility for asylum based on a well-founded fear of future persecution does not necessarily compel a grant of asylum. See INS v. Cardoza-Fonseca, supra. An applicant for asylum has the burden of establishing that the favorable exercise of discretion is warranted. See Matter of Pula, supra; see also Matter of Shirdel, 19 I&N Dec. 33 (BIA 1984). In exercising discretion, it is appropriate to examine the totality of the circumstances and actions of an alien in his flight from the country where persecution is feared. Matter of Pula, supra.

General humanitarian reasons, independent of the circumstances that led to the applicant's refugee status, such as his or her age, health, or family ties, should also be considered in the exercise of discretion. See Matter of Pula, supra. Although the totality of circumstances and actions of an alien in his or her flight from the country where persecution was suffered to the United States are to be considered, and may weigh against a favorable exercise of discretion, "the danger of persecution should generally outweigh all but the most egregious of adverse factors." Id. at 474.

*6. Discussion*

*a. One-year Deadline*

In order to be eligible for asylum, an applicant must show by clear and convincing evidence that the application has been filed within 1 year of the applicant's arrival in the United States, or that he or she qualifies for an exception, such as changed or extraordinary circumstances. See 8 C.F.R. § 208.4(a)(2) (2001). Changed circumstances must materially affect the

applicant's eligibility for asylum and may include changes in the applicant's country of nationality or changes in the applicant's own circumstances. See 8 C.F.R. § 208.4(a)(4) (2001). The applicant must then file an asylum application within a "reasonable period" given those circumstances. See 8 C.F.R. § 208.4(a)(4)(ii) (2001).

In this case, Respondent's eligibility for asylum depends in part upon circumstances that arose more than one year after his entry into the United States in February 1996. His claim of imputed political opinion is based in part upon what Cruz told his former associates upon his return to Colombia in late 1997. Furthermore, Respondent's personal circumstances changed significantly when his family began receiving threats in 1997 and 1998. Respondent's sister-in-law testified that on various occasions in September and October 1997, several men appeared at her place of employment, her house and at her son's school asking about Respondent and his family and threatening her when she refused to give them information. As a result, she went into hiding at her brother's house until she left for the United States in January 1998. Respondent's mother began receiving similar inquiries and threats, apparently in late 1997 and early 1998, and as a result she moved to Bogotá in February 1998. Less than one year after this last event, Respondent filed for asylum in the United States.

Considering these factors, this Court finds that Respondent qualifies for an exception to the one year deadline based on the emergence of threats against his family in Colombia more than one year after he entered the United States. The Court also finds that he filed his asylum application within a reasonable period given the changing circumstances of his family in Colombia and the

disruption caused by his children moving to the United States.

Respondent also contends that he believed, however mistakenly, that the DEA would help him obtain immigration status in exchange for assistance with the Cruz investigation. Testimony from both Agent Lincoln and Respondent's wife confirm that Respondent repeatedly visited the DEA office to inquire about his immigration status. Respondent apparently presents this "reliance" on DEA assistance as an extraordinary circumstance exception to the one-year deadline. See 8 C.F.R. § 208.4(a)(5) (2001). Because this Court finds Respondent eligible under the changed circumstance exception, it expresses no opinion on whether this alternative argument would also qualify as an extraordinary circumstance exception under 8 C.F.R. § 208.4(a)(5).

*b. Credibility and Corroboration*

The Court finds Respondent to be credible. Although minor uncertainties surfaced during Respondent's testimony with respect to the time elapsed between his arrival in the United States, the exposure of Cruz in the media, and Respondent's visits to the DEA, these appeared to be the result of poor estimation of the passage of time rather than any material inconsistencies or misrepresentations. Testimony by other witnesses corroborated Respondent's story and provided reasonably consistent dates for the principal events. Respondent's wife described their arrival in Virginia, their employment at Cruz's restaurant, and their subsequent trips to the DEA office. Agent Lincoln confirmed the DEA operation involving Cruz, the visa arrangements made for Respondent and his wife in 1996, and the visits by Respondent to the DEA office in early 1997. While

Agent Lincoln insisted he never promised Respondent any help with his immigration status, he did agree to ask the INS liaison about possible immigration arrangements. Respondent may have misinterpreted this offer or exaggerated its importance, but his asylum claim does not rest upon this event. Similarly, Agent Lincoln testified that Respondent reported no threats against his family during their meetings, but testimony indicates that the threats against Respondent's sister-in-law began later, in September 1997.

Respondent's testimony also corresponds to the general country conditions described in contemporaneous State Department reports. See Group Exhibit 5, Department of State Country Report on Human Rights Practices for Colombia, February 1999 (1998 Country Report). The 1998 Country Report states that "longstanding and widespread internal armed conflict and rampant violence – both criminal and political – persisted. The principal participants were government security forces, paramilitary groups, guerrillas, and narcotics traffickers." Id. at 1. In 1998 widespread violence involving these groups caused over two thousand deaths and displaced 300,000 civilians. Id. at 3. Some of this violence occurred in Valle del Cauca, the province containing Respondent's municipality of Buga, including the murder of a reporter who had written exposes on drug traffickers. Id. at 20.

Other, more recent State Department publications confirm that violence by "narcotraffickers, guerrillas, paramilitary groups and other criminal elements" affects "all parts of the country" and is "widespread and increasing." See Group Exhibit 5-A, Department of State Consular Information Sheet for Colombia, February 2000, at 1, 2. The most recent State Department Country Profile describes extremely violent and dangerous country

conditions: "Because of the violent nature of the narcotics traffickers and guerrillas whose activities and agenda are often influenced by the availability of drug money, almost any abuse alleged by asylum applicants from Colombia could have occurred or at least would not be inconsistent with the country conditions." See Group Exhibit 5-B, Department of State Profile of Asylum Claims and Country Conditions, June 1997 (Country Profile), at 7.[6] The Country Profile specifically mentions Valle de Cauca, Respondent's home province, as one of the most violent areas. Id. at 8. Although generally violent conditions are insufficient to establish a claim for asylum, they do lend credence to Respondent's description of threats targeted specifically at him. See Matter of S-V-, Interim Decision 3430 (BIA 2000).

Finally, Respondent provided evidence corroborating the specifics of his claim when it was reasonable to expect him to do so, as required by BIA precedent. See Matter of S-M-J-, supra; Matter of M-D-, supra. Aside from the corroborating testimony of three witnesses, Respondent provided an affidavit from his mother in Colombia describing threats against her and her subsequent relocation to Bogotá. Respondent also introduced during testimony four official documents from Buga and Chinchina, two municipalities in Colombia, certifying the violent death of Javier Cruz in August 1999. Although the INS objected to the lack of certified translation accompanying these four documents, Agent Lincoln also testified that Cruz had been killed in 1999.

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[6] The Country Profile also cautions that "[u]pon careful scrutiny, many allegations by applicants of mistreatment by narcotics traffickers alone turn out to involve criminal activity not covered by the relevant INA grounds for asylum." Country Profile, at 6. As discussed below, the Respondent must show that he fears persecution based on one of the protected grounds rather than mere criminal activity.

*c. Persecution*

Once a threshold finding of credibility has been reached, an applicant for asylum must establish that his fear is well-founded and that the harm feared constitutes persecution. See Matter of Mogharrabi, supra, at 446; see also Matter of Acosta, supra, at 226. A well-founded fear of persecution must be both subjectively genuine and objectively reasonable. See INS v. Cardoza-Fonseca, supra. To demonstrate a subjective fear of persecution, an applicant must demonstrate a genuine apprehension or awareness of the risk of persecution. See Matter of Acosta, supra, at 221. Respondent testified to a specific fear that he would be killed by former associates of Cruz because of his imputed association with the DEA. Respondent's prior actions also confirm the existence of a subjective fear. According to testimony by several witnesses, Respondent repeatedly approached the DEA in Roanoke in an attempt to avoid his return to Colombia, and he advised his mother to move to Bogotá in response to threats. Through telephone calls to Buga, Respondent was also aware of the threats against his sister-in-law and, by extension, his children. The Court finds that Respondent has a subjective fear of persecution.

The objective component requires a showing by credible, direct, and specific evidence in the record that the alien's fear of persecution is reasonable. See DeValle v. INS, supra, at 790. When directed at individuals whose identity is known to the persecutors, specific threats may give rise to a well-founded fear of persecution, even if unaccompanied by physical violence or direct confrontation. See Sotelo-Aquije v. Slattery, 17 F.3d 33, 37 (2d Cir. 1994), Arteaga v. INS, 836 F.2d 1227, 1232 (9th Cir. 1988), Artiga Turcios v. INS, 829 F.2d 720, 723 (9th Cir. 1987). Moreover, threats do not necessarily have to be conveyed directly to the target individual in order to

generate a well-founded fear. See Sotelo-Aquije, supra (threats delivered to victim's house), Artiga Turcios, supra (applicant saw from a distance guerrillas who were looking for him), Canjura-Flores v. INS, 784 F.2d 885 (9th Cir. 1985) (National Guard came looking for applicant at his home). Instead, the objective component of a well-founded fear rests upon specific evidence that the alien is individually targeted, bolstered by evidence suggesting that a reasonable person in the same circumstances would have such a fear. See Carranza-Hernandez v. INS, 12 F.3d 4 (2d Cir. 1993).

In this case, Respondent's persecutors had specific information about his residence and family members, and they came looking for information about him at several different locations, including his sister-in-law's house, his mother's house, his sister-in-law's place of employment, and his son's school. Respondent's sister-in-law testified that the men specifically asked about Respondent and identified his connection with Cruz. In several of these encounters, the men directly threatened the lives of the family members in an attempt to locate Respondent. These threats occurred against a background of massive violence perpetrated by drug traffickers and other groups that make Colombia the "murder capital of the world." Country Profile at 2. Given this climate of violence, this Court finds that Respondent's fear was objectively reasonable. Furthermore, the Court finds that the specific threats directed against Respondent distinguish his situation from generalized threats of violence faced by Colombians living in the area or returning from the United States. See Matter of S-V-, supra.

The INS disputes the level of threat faced by Respondent, citing testimony by Agent Lincoln that other employees of Cruz more closely connected to his drug operation remained in Colombia without incident.

However, none of these individuals received individual threats from drug traffickers. Furthermore, if Respondent is correct that Cruz identified him as the DEA informant, his position would differ significantly from that of Cruz's associates who remained in Colombia. Similarly, the fact that Cruz's family resides safely in Colombia does not undermine Respondent's claim, since no one has claimed they were identified as informants or targeted by drug traffickers.

For the harm or suffering to be considered persecution it must also be imposed either by the government or by persons or organizations the government is unable or unwilling to control. See Mgoian v. INS, 184 F.3d 1029, 1036 (9th Cir. 1999). Respondent alleges that he fears persecution by drug traffickers who believe he worked as an informant for the DEA. Although drug traffickers are not state actors, the concept of state-sponsored persecution includes persecution from groups or individuals whom the government is unable or unwilling to control. See Sotelo-Aquije, supra; Artiga-Turcios v. INS, supra; Matter of Kasinga, 21 I&N Dec. 357 (BIA 1996); Matter of Villalta, I&N Dec. 142 (BIA 1990).

While the Colombian government appears officially committed to stopping drug trafficking, widespread violence by drug traffickers throughout the country indicates that the government is as yet unable to control these groups. According to the most recent Country Report, the government faces "serious challenges to its control over the national territory," by paramilitary groups, guerrillas and narcotics traffickers. See Group Exhibit 5-C, Department of State Country Report on Human Rights Practices for Colombia, February 2001 (2000 Country Report), at 1. As in previous years, the report describes "rampant violence," including armed

action initiated in almost 1000 of Colombia's 1085 municipalities. See Id. The Country Profile reports that "Colombian society has been overwhelmed by widespread internal violence and rampant killings that make it the murder capital of the world." See Country Profile at 2. In addition, while the national government has declared itself opposed to drug traffickers, judges and prosecutors are subject to threats and violent attacks, "particularly when dealing with cases involving members of the public security forces or of paramilitary, narcotics, and guerrilla organizations." See 2000 Country Report at 16. This situation often makes successful prosecution of these groups extremely difficult. In a recent unpublished opinion, the Ninth Circuit assumed drug traffickers in Colombia formed a group the government was unwilling or unable to control, though the court denied the petition for review because the threats were based upon a refusal to carry drugs rather than any imputed political opinion. Sanchez v. INS, 119 F.3d 7 (9th Cir. 1996, unpublished). Finally, Respondent's sister-in-law reported the threats to the local police but was told they could do nothing without further proof. Based on this evidence, the Colombian government appears unable to control the drug traffickers threatening Respondent, and the Court finds Respondent's fear that he would face persecution if he returned to Colombia to be well-founded.

*d. Nexus*

Once an applicant for asylum demonstrates a well-founded fear of persecution, he must also show that the persecution is "on account of" race, religion, nationality, membership in a particular social group, or political opinion. See INA § 101(a)(42)(A). Respondent claims that because the narcotics traffickers believe he is an informant for the DEA, they have imputed certain political opinions to him and have targeted him for

persecution as a result. In order to make this claim, Respondent must show both the acting as an informant for the United States government constitutes a political opinion, and that his persecutors have imputed that opinion to him. This Court finds Respondent has met his burden on both counts.

Neither the Board of Immigration Appeals (BIA or Board) nor the Fourth Circuit Court of Appeals has ruled on whether acting as an informant for one side in a sustained conflict constitutes an expression of political opinion. As a result, this Court may look to the decisions of other circuits for guidance. In cases of civil war, the Ninth Circuit has held that informing one side about the other may be treated as a political stance. Briones v. INS, 175 F.3d 727 (9th Cir. 1999). In Briones, although the Court remanded for a credibility determination, it found that "Briones's activity as a confidential informer who sided with the Philippine military in a conflict that was political at its core certainly would be perceived as a political act by the group informed upon..." Id. at 729. See also McMullen v. INS, 658 F.2d 1312 (granting asylum based on cooperation with the government against the Provisional IRA) (9th Cir. 1981); Fadul v. INS, 210 F.3d 374 (7th Cir. 2000, unpublished) (noting that testimony that petitioner was viewed as a government informant may support a claim based on political opinion but dismissing claim for lack of jurisdiction). But see Adhiyappa v. INS, 58 F.3d 261 (6th Cir. 1995) (affirming denial of asylum because petitioner's decision to inform on Tamil activists may have been motivated by non-political reasons). The perception of the persecutor determines whether an alien holds an imputed political opinion, and one side in a political conflict may consider clandestine informing for its enemy as equivalent to a political statement of opposition.

From the perspective of the drug traffickers, Respondent's association with the DEA was tantamount to choosing the other side in their conflict with the Colombian government. If, therefore, that conflict is political, the opinions imputed to Respondent would trigger the protection of United States asylum law. In general, a government's struggle against drug trafficking is not inherently political, and courts have been reluctant to find imputed political opinion in that context. In an unpublished opinion, the Tenth Circuit found an insufficiently strong connection between a local drug pusher and anti-government groups in the Philippines to sustain a claim for asylum based on political opinion for a local prosecutor. Mauro v. INS, 232 F.3d 901 (10th Cir. 2000, unpublished). In another unpublished decision, the Ninth Circuit denied a petition for review of an asylum claim based on persecution of an informant by drug traffickers in Honduras. See Torrez-Herrera v. INS, 985 F.2d 574 (9th Cir. 1993, unpublished). Given the vastly different position of Colombia with respect to drug trafficking, the Ninth Circuit decision does not persuade this Court that acting as an informant on drug traffickers may not involve an imputed political opinion. The intensely political dimension of the drug trade in Colombia means that acting as an informant for the United States government implies a political stance in that country's severe internal conflict.

In Colombia, several different armed groups are in open, violent conflict with one another and with the government, over both political ideas and control of drug operations. According to the most recent State Department Report, paramilitary groups vied with guerrillas for control of territory and drug operations in several provinces, including Valle del Cauca, resulting in hundreds of selective killings, as well as widespread torture and abuse. 2000 Country Report at 8. Earlier

reports noted that major guerrilla organizations received a significant portion of their revenues from narcotics production and trafficking. 1998 Report at 1. The 1997 Country Profile reiterated that in rural areas some guerrilla groups collaborated with narcotics traffickers. Country Profile at 2.[7] As for other judicial opinions, no case directly addresses the position of an informant in Colombia, though one court remanded for consideration on the merits of the claim that drug traffickers in Colombia would persecute the applicant based on his previous work gathering information for the Colombian police. Campos-Sanchez v. INS, 164 F.3d 448 (9th Cir. 1999). Finally, at Respondent's hearing, Agent Lincoln testified to the "melding" of the drug trade and the guerrillas and noted the heavy involvement of the Colombian government in United States anti-drug policies. Given the intricate connection between political violence and drug violence in Colombia, and the well-publicized, high levels of assistance granted the Colombian government by the United States, the Court finds that someone identified as an informant for the DEA could be seen as actively cooperating in the fight against drug traffickers, and by extension, against the armed groups who benefit from it.

Even if acting as an informant for the United States government implies a political opinion in Colombia, Respondent must still demonstrate that the drug traffickers attribute that opinion to him and are willing to persecute him because of it. Respondent does not have to show that he actually held or expressed that opinion, as persecution for imputed grounds may satisfy

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[7] The Country Profile also noted the impact on asylum applications: "The extensive cooperation between the guerrillas and drug traffickers has had a significant influence on asylum claims from Colombia, with most applicants alleging threats or mistreatment by the guerrillas or narcotics traffickers or both." Id. at 6.

the definition of refugee. Matter of S-P-, 21 I&N Dec. 486, 489 (BIA 1996); Matter of A-G-, 19 I&N Dec. 502, 507 (BIA 1987). Moreover, even after the Supreme Court stressed the motivation of the persecutor in Elias-Zacarias, supra, the BIA held that when multiple motives for persecution are possible, an applicant is not required to prove the "actual, exact reason" persecution may occur. Matter of S-P-, supra, at 489. See also Matter of Fuentes, supra, at 662. Rather, "the applicant must produce evidence from which it is reasonable to believe that the harm was motivated, at least in part, by an actual or imputed protected ground." Matter of T-M-B-, supra, at 777.

Several factors indicate that Respondent's persecutors acted out of his connection to Cruz and the DEA. First, when Cruz was asked who might be in danger from drug traffickers if the DEA had to terminate the operation suddenly, he named his household staff, including Respondent and his wife. As a result, the DEA obtained temporary United States visas for both of them. This strongly suggests that Cruz believed drug traffickers would connect Respondent to him. Second, according to testimony by Agent Lincoln, the newspaper story exposing Cruz as a DEA informant was picked up by the wire services and reprinted in the major Colombian newspaper El Tiempo. Drug traffickers in Colombia therefore would have been able to connect Cruz, and by extension his personal staff, to the DEA. Third, when the men who threatened Respondent's sister-in-law were asked why they were looking for Respondent, they identified his employer as an informant for the DEA. Finally, the timing of the threats against Respondent's family allows for the possibility that Cruz spread misinformation among the drug traffickers about Respondent's activities. Cruz was exposed as a DEA informant by the media in November 1996. Cruz then

relocated to Miami, returning to Roanoke twice to testify before the grand jury. Later in 1997, three weeks before his sentencing, Cruz fled to Colombia in order to escape what he feared would be a harsh sentence. Respondent's sister-in-law testified that her first encounter with the threatening men occurred in September 1997, some ten months after publication of the newspaper articles but relatively proximate to Cruz's arrival in Colombia. Threats against Respondent's sister-in-law and mother continued until they both went into hiding. Taken together, these factors strongly suggest that the threats against Respondent and his family were based on his connection to Cruz. Moreover, they make it reasonable and plausible to believe that Respondent's persecutors targeted him because of his willingness to associate himself with Cruz and the DEA.

*e. Country-wide Fear of Persecution*

An applicant must also demonstrate that his fear of persecution is country-wide. See Matter of Acosta, supra, at 235; Matter of Fuentes, supra. Respondent claims that drug traffickers operate throughout Colombia and that he would not be able to relocate to another part of the country. This Court agrees. As mentioned above, the Country Profile describes Colombia as "overwhelmed by widespread internal violence and rampant killings." See Country Profile at 2. The most recent Country Report documents rampant violence by drug traffickers, guerrillas, and paramilitaries, including armed attacks in almost 1000 of 1085 municipalities. See 2000 Country Report at 1. The February 2000 Consular Information Sheet notes that violence by these groups affects "all parts of the country." See Consular Information Sheet at 1. Agent Lincoln testified that he "could not think of any place in Colombia where there is not some influence by traffickers," though he also testified the level of violence

in major cities had declined and were therefore "fairly safe."

The INS points out that Respondent's mother has lived in Bogotá since some point in 1998, apparently without incident. However, the fact that the assailants did not continue to harass Respondent's mother does not imply that they would not make more concerted efforts to locate Respondent, or that once located, they would not be willing or able to reach Respondent inside the city. Given the pervasive nature of the violence described in the State Department reports, this Court finds that Respondent faces the threat of persecution throughout the country.

Accordingly, Respondent and his derivative family members have established statutory eligibility for asylum.

*f. Discretionary Factors*

In addition to demonstrating statutory eligibility for asylum, an alien must also show that he merits a favorable exercise of the Court's discretion. See Matter of Pula, supra. Respondent and his wife entered this country legally with temporary visas obtained from the DEA, and his children entered on temporary visas obtained by his sister-in-law. All members of Respondent's family traveled directly to the United States from Colombia. The record contains no indication of any fraud or misrepresentation by Respondent or his family. In fact, nothing in the record indicates that Respondent and his family are anything other than innocent persons caught up in an undercover operation intended to lead to the arrest and incarceration of drug dealers in Colombia. As a result, the Court favorably exercises its discretion and will grant relief in the form of asylum.

Since Respondents will be granted relief in the form of asylum, the Court need not reach Respondents' eligibility for withholding of removal under INA § 241(b)(3) or protection under the Torture Convention.

After a careful review of the entire record, the following order will be entered:

**ORDER**

It is Ordered:

that Respondents' applications for asylum be GRANTED.

/s/ July 30, 2001

Date

/s/ M. Christopher Grant

M. Christopher Grant
United States !mmigration Judge

DEC 28 2005
OFFICE OF THE CLERK

No. 05-266

# In the Supreme Court of the United States

APOLINAR PERAFAN SALDARRIAGA, ET AL.,
PETITIONERS

*v.*

ALBERTO R. GONZALES, ATTORNEY GENERAL

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
*Solicitor General*
*Counsel of Record*
PETER D. KEISLER
*Assistant Attorney General*
DONALD E. KEENER
FRANCIS W. FRASER
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

## QUESTION PRESENTED

Whether the court of appeals correctly affirmed the Board of Immigration Appeals' decision that petitioner's fear of retribution by drug traffickers did not establish a well-founded fear of future persecution on account of political opinion.

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# In the Supreme Court of the United States

No. 05-266

APOLINAR PERAFAN SALDARRIAGA, ET AL.,
PETITIONERS

*v.*

ALBERTO R. GONZALES, ATTORNEY GENERAL

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A13) is reported at 402 F.3d 461. The decisions of the Board of Immigration Appeals (Pet. App. A14-A20) and the Immigration Judge (Pet. App. A21-A51) are unreported.

### JURISDICTION

The court of appeals entered its judgment on March 29, 2005. A petition for rehearing en banc was denied on June 1, 2005 (Pet. App. A1). The petition for a writ of certiorari was filed on August 25, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, defines a "refugee" as an alien who is unwilling or unable to return to his or her country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). If the "Attorney General determines" that an alien is a "refugee," 8 U.S.C. 1158(b)(1), he may, in his discretion, grant the alien asylum in the United States, 8 U.S.C. 1158(b) (2000 & Supp. II 2002). In addition to the discretionary relief of asylum, mandatory withholding of removal is available if "the alien's life or freedom would be threatened in [the country of removal] because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A).

The decision whether to grant asylum to an alien in removal proceedings rests with the Attorney General. 8 U.S.C. 1103(g), 1158(b)(2)(A) (2000 & Supp. II 2002); 8 U.S.C. 1229a(c)(4). Congress also provided that, in the administration of the Immigration and Nationality Act, the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." 8 U.S.C. 1103(a)(1) (2000 & Supp. II 2002). Regulations adopted by the Attorney General governing claims for relief in removal proceedings place the burden on the applicant for asylum to establish that he or she is a refugee who faces a well-founded fear of persecution. To obtain withholding of removal, the applicant bears the burden of establishing that he or she qualifies as a refugee and that his or her life or freedom would be threatened. 8 C.F.R. 208.13(a), 208.16(b).

For purposes of both forms of relief, "persecution" generally refers to significant mistreatment by the government itself or by groups or individuals that the government is unable or unwilling to control. See *In re Villalta*, 20 I. & N. Dec. 142, 147 (B.I.A. 1990); *In re Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985), overruled in part on other grounds, *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987). Routine crimes and personal vendettas do not amount to persecution on account of political opinion. See *Silva* v. *Ashcroft*, 394 F.3d 1, 6 (1st Cir. 2005) (rejecting asylum claim based on applicant's whistle-blowing against corrupt employer as "essentially a personal dispute"); *In re Y-G-*, 20 I. & N. Dec. 794, 799-800 (B.I.A. 1994) (noting that "[a]liens fearing retribution over purely personal matters will not be granted asylum on that basis" and adding that "[s]uch persons may have well-founded fears of harm, but such harm would not be on account of race, religion, nationality, membership in a particular social group, or political opinion").

2. Petitioners are Apolinar Perafan Saldarriaga, his wife, and their two children. Petitioners are natives and citizens of Colombia who entered the United States in February 1996 on nonimmigrant B-2 visas with authorization to remain until August 1996. Pet. App. A4, A22. Petitioners were placed in immigration proceedings in April 1999 as nonimmigrants who remained in the United States for a longer time than authorized, in violation of 8 U.S.C. 1227(a)(1)(B). Pet. App. A6, A22.

Petitioner Saldarriaga then applied for asylum for himself and for his wife and children derivatively. Pet. App. A6; see 8 U.S.C. 1158(b)(3) (Supp. II 2002). Saldarriaga claimed that he had a well-founded fear of future persecution because Colombian drug dealers might

seek retribution against him based on his employment by an informant for the Drug Enforcement Administration (DEA) and on his own association with the DEA. More particularly, Saldarriaga testified that, in Colombia, he had been employed as a driver for a drug trafficker, Javier Cruz. Pet. App. A4-A5. Cruz subsequently offered Saldarriaga employment in a restaurant in Roanoke, Virginia, and Saldarriaga and his family moved to the United States after being granted temporary visas. *Ibid.* Eight months later, Cruz fired Saldarriaga in a labor dispute. *Ibid.* The next month, the *Roanoke Times* reported that Cruz was a DEA informant. *Ibid.* Saldarriaga then offered to cooperate with the DEA to help protect his immigration status. *Id.* at A5. After several interviews, however, the DEA "determined that [Saldarriaga] possessed no useful information that was not already known by the DEA." *Ibid.*

Saldarriaga testified at the immigration hearing that he was afraid to return to Colombia because he believed that Cruz had told other Colombian drug dealers that Saldarriaga had worked as a DEA informant. Pet. App. A26. Saldarriaga also testified that a group of men went to his sister-in-law's home in Colombia and threatened to kill him. *Ibid.*[1]

A DEA agent testified at the hearing that Saldarriaga was unlikely to be in danger if returned to Colom-

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[1] Although Saldarriaga claims (Pet. 12, 19) that his brother "was killed on account of [Saldarriaga's] relationship with the DEA," he cites nothing in the administrative record to support that allegation. Indeed, in his opening brief in the court of appeals (at 8), Saldarriaga asserted that his brother was killed after the decision of the immigration judge. That allegation thus is not part of the administrative record under review before this Court.

bia "because nothing had happened to other employees of Cruz who stayed in the country or to Cruz's family." Pet. App. A30. The agent noted that Cruz had been killed two years after he returned to Colombia, but explained that Cruz's death was not connected to his work with the DEA. Rather, Cruz was killed by one of his own bodyguards in a dispute with a rival drug faction. *Id.* at A5, A29.

3. The immigration judge granted the applications for asylum. Pet. App. A21-A51. The immigration judge ruled that Saldarriaga had established a well-founded fear of future persecution based on an imputed association with the DEA, *id.* at A41, because "someone identified as an informant for the DEA could be seen as actively cooperating in the fight against drug traffickers," *id.* at A47.

The Board of Immigration Appeals (Board) overturned the decision of the immigration judge. Pet. App. A14-A20. The Board ruled that Saldarriaga's "speculation that he was connected in the minds of the narcotraffickers with the DEA is not supported by persuasive evidence," *id.* at A17, and that his allegation that he would be targeted "appears to be an embellishment that evolved over time," *id.* at A18. The Board also found that Saldarriaga failed to "rebut testimony that other individuals, more closely involved with his employer than himself, had returned to Colombia and not been harmed." *Ibid.* Finally, the Board concluded that Saldarriaga's "failure to volunteer any information to authorities until he felt it was in his own best interest[] severely undermines the persuasiveness of his testimony," and that, considering the record as a whole, "the testimony in this case was clearly insufficiently accurate to persuade us that [Saldarriaga] would be targeted in

Colombia." *Ibid.* The Board then remanded the case for the immigration judge to permit petitioners to apply for voluntary departure. *Id.* at A19.[2]

4. The court of appeals unanimously denied the petition for review. Pet. App. A2-A13. As an initial matter, the court of appeals rejected the government's argument that the Board's remand to the immigration judge to address voluntary departure deprived the court of jurisdiction. *Id.* at A7. On the merits, the court ruled that Saldarriaga failed to establish "how his connection to the drug trade or his collaboration with the DEA stemmed from a political position he espouses." *Id.* at A3. The court reasoned that, to constitute persecution on the basis of political opinion, the targeted behavior of the applicant "must be motivated by an ideal or conviction of sorts before it will constitute grounds for asylum." *Id.* at A9.

The court also ruled that, even had Saldarriaga "manifested a political opinion * * *, there is no indication that the cartel members would persecute him *in response to* that manifestation." Pet. App. A12. The court noted that "the inscrutability of the political opinion [Saldarriaga] claims implies that any persecution he faces is due to the fact of his cooperation with the government, rather than the content of any opinion motivating that cooperation." *Ibid.* The court concluded that "[b]eing involved in the drug wars of a foreign country with their webs and patterns of violence and recrimination is not the same thing as being persecuted on account of a political opinion." *Id.* at A13.

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[2] One Board member issued a one-sentence dissent. Pet. App. A20.

## ARGUMENT

The court of appeals' decision is correct and consistent with the decisions of this Court and of other courts of appeals. Petitioners' challenge to the court of appeals' affirmance of the Board's determination that they presented insufficient evidence of persecution on a protected ground is record-bound and does not warrant this Court's review.

1. As an initial matter, there is a jurisdictional question that stands as a potential barrier to the Court's review. The Board, in the decision under review, reversed the immigration judge's grant of asylum, but remanded the case to the immigration judge to allow petitioners to apply for voluntary departure. Pet. App. A19-A20. The Immigration and Nationality Act grants the courts of appeals jurisdiction to review only the issuance of a "final order of removal." 8 U.S.C. 1252(a)(1). Because a final determination of whether an alien will be removed or, instead, will be permitted to depart voluntarily is integral to the entry of a final order "of removal," there is a substantial question whether the court of appeals had jurisdiction over petitioners' appeal. But see Pet. App. A7 n.2 (asserting jurisdiction); *Castrejon-Garcia* v. *INS*, 60 F.3d 1359, 1361-1362 (9th Cir. 1995) (rejecting the argument that a remand for consideration of voluntary deportation deprives the Board's order of removal of finality for purposes of appeal); cf. *Del Pilar* v. *United States Attorney General*, 326 F.3d 1154, 1156-1157 (11th Cir. 2003) (per curiam) (remand for designation of country for removal does not deprive the order of removal of finality for purposes of appeal); *Perkovic* v. *INS*, 33 F.3d 615, 618-620 (6th Cir. 1994) (formal order